APPENDIX.

NOTE (A) to Mandeville *v.* Riddle, *ante*, p. 299.

DUNLOP *v.* SILVER.

THE question of liability of a remote indorser of a promissory note, in Virginia, came before the court below, about a year before their decision in the present case. It was in the case of *Dunlop* v. *Silver and others*, argued at July term 1801, in Alexandria. The court took the vacation to consider the case, and examine the law, and, at the succeeding term, judgment was rendered for the plaintiff by KILTY, Chief Judge, and CRANCH, Assistant Judge, contrary to the opinion of Judge MARSHALL.

The case was this. James Cavan made a promissory note, by which he promised to pay to Silver *et al.*, or order, sixty days after date, $600 for value received, negotiable at the bank of Alexandria. Silver *et al.* indorsed the note to Downing & Dowell, in these words, "pay the contents to Downing & Dowell," who indorsed, "pay the contents to John Dunlop, or order." Dunlop had obtained judgment on the note against Cavan, the maker, who was taken upon the execution, and took the oath of an insolvent debtor.

The declaration had two counts. 1st. A special count, stating the making and indorsing the note, the suit, judgment, execution and insolvency of Cavan, by reason whereof, the defendant became liable, &c. 2d. *Indebitatus assumpsit* for money had and received. The plea was *non assumpsit*, and a verdict was taken for the plaintiff subject to the opinion of the court, upon the point, whether the holder could maintain an action against the remote indorser of a promissory note.

The statute 3 & 4 Ann. c. 9, respecting promissory notes, is not in force in Virginia; but there is an act of assembly, 1786, c. 29, by which it is enacted, that "an action of debt may be maintained upon a note or writing, by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to * another;" and that "assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; [*368 and an assignee of any such may, thereupon, maintain an action of debt in his own name; but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

It will be observed, that this act gives no action against the indorser or assignor, nor does it make any distinction between notes payable to order, and those payable only to the payee. Hence, perhaps, it may be inferred, that it left such instruments as the parties themselves, by the original contract, had made (or intended to make) negotiable, to be governed by such principles of law as may be applicable to those instruments. At any rate, it seemed to be admitted, that the act did not affect the present case.

The principal question, then, is, whether this action could have been supported in England, before the statute of Anne.

I. In order to ascertain how the law stood before that statute, it may be necessary to examine how far the custom of merchants, or the *lex mercatoria*, was recognised by the courts of justice, and by what means the common-law forms of judicial proceedings were adapted to its principles.

A distinction seems to have been made, very early, between the contracts of merchants (especially of foreign merchants), and those of other people. Nearly six hundred years ago, we find their "old and rightful customs" protected by the great charter of English liberties. (Magna Charta, c. 30.) Peculiar privileges were also granted them, more than 500 years ago, by the statute of Acton Burnel, de mercatoribus, 11 Edw. I., and the statute of merchants, 13 Edw. I. And in the reign of Edw. III., many statutes were made for their encouragement, in some of which, particularly 27 Edw. III., c. 19 & 20, the law-merchant is expressly recognised. In the 13 Edw. VI., 9, 10 (cited by Molloy, book 3, c. 7, § 15), it is said, that "a merchant stranger made suit before the king's privy council, for certain bales of silk, feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the lord chancellor answered, that this suit is brought by a merchant, who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men."

The custom of merchants is mentioned in 34 Hen. VIII., cited in Bro. Abr., tit. Cus
*369] toms, pl. 59, where it was pleaded, as a custom between merchants *throughout the whole realm, and the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time, it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among merchants residing in London and merchants in Hamburg, &c. By degrees, however, the courts began to consider it as a general custom. Co. Litt. 182; 2 Inst. 404. And in the time of James I., Ch. J. Hobart, in the case of *Vanheath* v. *Turner*, Winch 24, said, that "the custom of merchants is part of the common law, of which the judges ought to take notice." It was still, however, deemed necessary to set forth the custom specially; and in that form, the precedents continued, for some time after. Indeed, the pleadings continued in that form, long after the courts had decided it to be unnecessary. Lord Coke, in his Commentary on Littleton (first published in 1628), folio 182 *a*, speaking of the *lex mercatoria*, says, "which, as hath been said, is part of the laws of this realm." See also 2 Inst. 404.

But after this, in the year 1640, in *Eaglechild's Case*, reported in Hetly 167, and Litt. 363, 6 Car. I. (it was said to have been ruled in B. R.), "that upon a bill of exchange between party and party, who were not merchants, there cannot be a declaration upon the law-merchant; but there may be a declaration upon *assumpsit*, and give the acceptance of the bill in evidence." This decision seemed to confine the operation of the law-merchant, not to contracts of a certain description, but to the persons of merchants: whereas, the custom of merchants is nothing more than a rule of construction of certain contracts. Jac. Law Dict. (Toml. edit.) tit. Custom of Merchants. *Eaglechild's Case*, however, was overruled in the 18 Car. II., B. R. (1666), in the case of *Woodward* v. *Rowe*, 2 Keb. 105, 132, which was an action by the indorsee against the drawer of a bill of exchange. "The plaintiff counted on the custom and law of the realm, that if any man writes a bill to another, then if he to whom the bill is directed, do not pay for the value received by the maker, the maker of such bill should pay." "It was moved in arrest of judgment, that this count is ill, the general custom being the law; and it doth not appear to the court, that there is any such law. *Sed curia*, contrà, that by the common law, a man may resort to him that received the money, if he to whom the bill was directed, refuse." It was afterwards moved again, that this "is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough, generally, for any man, without naming him merchant; judgment *pro* plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant."

*370] *The same principle was, two years afterwards, recognised in an *Anonymous* case (but believed to be *Milton's Case*, *vide* 1 Mod. 286), in the exchequer, reported

in Hardres 485, Mich. 20 Car. II. (1668), where the plaintiff declared on the custom of England, and after verdict, Offley moved in arrest of judgment, because the "plaintiff had declared that *per consuetudinem Angliæ*, &c., which he said was naught, because the custom of England is the law of England, and what the judges are bound to take notice of; and that, therefore, the *consuetudo Angliæ* ought to have been omitted." But the Chief Baron said, "but for the plaintiff's inserting the custom of the realm into his declaration here, I hold that to be mere surplusage and redundancy, which does not vitiate the declaration." And again he says, "it were worth while to inquire, what the course has been amongst merchants; or to direct an issue for trial of the custom among merchants in this case; for although we must, in general, take notice of the law of merchants; yet, all their customs we cannot know, but by information." Afterwards, in declaring their opinions, the court said "that this course of accepting bills being a general custom amongst all traders, both within and without the realm, and having everywhere that effect to make the acceptor subject to pay the contents, the court must take notice of that custom."

Notwithstanding these decisions, the question was again made, about twenty years afterwards, in the case of *Carter* v. *Downish* (1 W. & M., Anno 1688), 1 Show. 127, in the exchequer, on a writ of error from the king's bench. The defendant had covenanted to pay all bills which should be drawn on him, in favor of the plaintiff, on account of 1000 kentals of fish, and the breach assigned was, the non-payment of a certain bill. The defendants pleaded, that the plaintiff by indorsement on the bill, according to the custom of merchants, appointed the payment to Herbert Aylwin, or his order, who indorsed it to Tassel, to whom the defendant paid it. To this plea, there was a demurrer, and joinder. One of the errors assigned was, that the defendant had not set forth a particular custom, to warrant the indorsement. To which it was answered, "that the law and custom of merchants warrant the indorsement of foreign bills of exchange, and for that, all the book cases on foreign bills are a proof; and that such indorsement doth really transfer the property of the money, or contents, in such bills to the indorsee, and that all this law of merchants is part of the law of the land, and the judges are obliged to take notice of that as well as of any other law." And the following cases were cited: 1 Inst. 182 *a*; 2 Inst. 58, 204; F. N. B. 117, Reg. 135; 13 Edw. IV., 9; *Holland's Case*, 4 Co. 76; Fitz. Abr. tit. Account, 127. *Lord Chief Justice Pollexfen.—"As to that of the law of merchants, I think, we are bound to take notice of it, as we do of that of survivorship and account, and this is as well known." Ventris concurred, and they all inclined to reverse the judgment; but upon Tremayne's importunity, *adjornatur*. [*371

Three years after this, however, the point was again made, in the case of *Mogadara* v. *Holt* (3 W. & M.), 1 Show. 318, and 12 Mod. 15, 16 (Anno 1699), where it was held by Holt, Chief Justice, and the whole court, "that the law of merchants is *jus gentium*, and part of common law, and *ergo*, we ought to take notice of it, when set forth in pleading." And "though the plaintiff hath alleged a custom contrary to fact, yet that is but surplusage; and he needed not to have alleged a custom." *Jud. pro quer.*

Not satisfied with these adjudications, the question was again agitated, two years afterwards, in the exchequer, on a writ of error from the king's bench, in the case of *Williams* v. *Williams*, Carth. 269 (Pasch., 5 W. & M., Anno 1693), where "the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is) but had declared on a custom through all England, and if so, 'tis the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place from whence a venue might arise to try it. To which it was answered, that this custom of merchants, concerning bills of exchange, is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter* v. *Downish*; and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person, *secundum usum et consuetudinem mercatorum*, drew the bill; therefore, all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it. The judg-

ment was affirmed." Similar doctrine was also held by Lord HOLT, in the same term, in the case of *Hodges* v. *Steward*, 12 Mod. 37 (Pasch., 5 W. & M., Anno 1693).

Again, in Hilary term (B. R., 8 & 9 Wm. III., Anno 1697), *Pinkney* v. *Hall*, 1 Ld. Raym. 175, the exception was taken, "that the declaration being *per consuetudinem Angliæ*, &c., was ill, because the custom of England is the law of England, of which the judges ought to take notice, without pleading. *Sed non allocatur.* For though, *372] heretofore, *this has been allowed, yet, of late time, it has always been overruled." And another exception was "that though *lex mercatoria* is part of the law of England, yet it is but a particular custom among merchants; and, therefore, it ought to be shown, in London, or some other particular place. *Sed non allocatur.* For the custom is not restrained to any particular place."

The same principles were, in the same term, in the common pleas, held, in the case of *Bromwich* v. *Loyd* (Hilary term, 8 Wm. III.), 2 Lutw. 1585, where TREBY, Chief Justice, said, "That bills of exchange, at first, were extended only to merchant strangers, and afterwards to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons trading or not; and there was no occasion to allege any custom: and that was not denied by any of the other justices."

In 10 Wm. III., Anno 1698, B. R., *Hawkins* v. *Cardy*, 1 Ld. Raym., 360, an action was brought on a promissory note, made by the defendant, and indorsed by the payee to the plaintiff for part only, who declared on the custom of merchants for such an indorsement. But on demurrer, it was adjudged ill. "For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by contract he is liable but to one." And HOLT, Chief Justice, said, "This is not a particular local custom, but the custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so." Judgment for defendant.

Four years after this, in the case of *Buller* v. *Crips*, 6 Mod. 29 (B. R., 2 Ann., Anno 1702), Lord HOLT said, "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which, HALE, who tried it, laughed, and said, 'they had a hopeful case on't.' And in my Lord NORTH's time, it was said, that the custom in that case was part of the common law of England, and the actions since became frequent, as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest."

In the year 1760 (1 Geo. III.), in the case of *Edie* v. *The East India Company*, *373] 2 Burr. 1226, Mr. Justice FOSTER said, "Much has been said about the *custom of merchants; but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is, between general customs (which are part of the common law) and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law, and, therefore, ought not to have been left to the jury, after it has been already settled by judicial determinations." And in the same case, p. 1228, Mr. Justice WILMOT says, "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may, indeed, be some questions, depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet, that is only where the law remains doubtful. And even there, the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." In the case of *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1669, Lord MANSFIELD says, "the law of merchants and the law of the land is the same; a witness cannot be admitted to prove the law of merchants; we must consider it as a point of law."

Sir MATTHEW HALE, in his History of the Common Law of England, first published in 1713 (3d edit.), p. 24, 25, speaking of the common law, as it is taken in its

proper and usual acceptation, says, "And besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment; and though by reason of that application, the said common law assumes diverse denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name from the province, shire, island or country to which it is contiguous, yet these are but parts of the same ocean. Thus the common law includes *lex prerogativa*, as it is applied with certain rules to that great business the king's prerogative; so it is called *lex forestæ*, as it is applied, under its special and proper rules, to the business of forests; so it is called *lex mercatoria*, as it is applied, under its proper rules, to the business of trade and commerce."

To these authorities will be added only that of CHRISTIAN, in his note to 1 Bl. Com. 75. "The *lex mercatoria*, or custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, *and all mercantile contracts are as much the general laws of the land as the laws relating to marriage, or murder." [*374

This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land; and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority so far as subjects existed for it to act upon. The reason why it was not recognised by the courts, and reduced to a regular system, as soon as the laws relating to real estate, and the pleas of the crown, seems to be, that in ancient times, the questions of a mercantile nature, in the courts of justice, bore no proportion to those relating to the former subjects. Before the time of James I., we have scarcely a mercantile case in the books; and yet, long before that time, the laws respecting real estates, and the criminal code, were nearly as well understood as they are at this day. Hence, it cannot be a matter of great surprise, that the principles of commercial law, which have been developed by the exigencies of modern times, should have been, by some, considered as exceptions from the general principles of the common law. The truth seems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books, is, that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established, until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right, that established forms should be respected, yet it must be acknowledged, that they have, in some measure, obstructed that gradual amelioration of the jurisprudence of the country, which the progressive improvement of the state of civil society demanded. It required the transcendent talents, and the confidence in those talents, which were possessed by Lord MANSFIELD to remove those obstructions. When he ascended the bench, he found justice fettered in the forms of law. It was his task to burst those fetters, and to transform the chains into instruments of substantial justice. *From that time, a new æra commenced in the history of English jurispru- [*375 dence. His sagacity discovered those intermediate terms, those minor propositions, which seemed wanting to connect the newly-developed principles of commercial law with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions.

II. Forms of pleading often tend to elucidate the law. By observing the forms of declarations, which have, from time to time, been adapted, in actions upon bills of ex-

change, we may, perhaps, discover the steps by which the courts allowed actions to be brought upon them, as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used, take no notice of the custom of merchants, as creating a liability distinct from that which arises at common law; but by making use of several fictions, bring the case within the general principles of actions of *assumpsit*. The oldest form which is recollected, is to be found in Rastell's Entries, fol. 10,(*a*) under the head "Action on the Case upon promise to pay money." Rastell finished his book, as appears by his preface, on the 28th of March 1564, and gathered his forms from four old books of precedents, then existing. This declaration sets forth that A. complains of B. &c., for that whereas, the said A., by a certain I. C., his sufficient attorney, factor and deputy in this behalf, on such a day and year, at L., at the special instance and request of the said B., had delivered to the said B., by the hand of the said I. C., to the proper use of the said B., 110*l.* 8*s.* 4*d.* lawful money of England; for which said 110*l.* 8*s.* 4*d.*, so to the said B. delivered, he, the said B., then and there, to the said I. C. (then being the sufficient attorney, factor and deputy of the said A. in this behalf) faithfully promised and undertook, that a certain John of G. well and faithfully would content and pay to Reginald S. (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor and attorney of the said A. in this behalf), 443 2-3 ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G. should not pay and content the said Reginald S. the said 443 2-3 ducats, at the time above limited, that then the said B. would well and faithfully pay and content the said A. 110*l.* 8*s.* 4*d.*, lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A. requested. It then avers, that the said 443 2-3 ducats were of the value of 110*l.* 8*s.* 4*d.*, lawful money of England, that John of G. had not paid the ducats to Reginald S., and that if he had paid them "to the said R., I. B., and associates, or to either of them, then the said 443 2-3 ducats would have come to the benefit and profit of the said A. Yet the said B., contriving, the aforesaid A., of the said 110*l.* 8*s.* 4*d.* and of *the damages and interest thereof, falsely and subtly to deceive and defraud, the same, or any part thereof, to the said A., although often thereunto required, according to his promise and undertaking aforesaid, had not paid, or in any manner contented, whereby the said A., not only the profit and gain which he, the said A., with the said 110*l.* 8*s.* 4*d.*, in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A., in his credit towards diverse subjects of our lord the king (especially towards R. H. and I. A., to whom the said A. was indebted in the sum of 110*l.* 8*s.* 4*d.*, and to whom the said A. had promised to pay the same 110*l.* 8*s.* 4*d.*, at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid), is much injured, to his damage," &c.

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This declaration seems to have been by the indorsee of a bill of exchange, against the drawer. For although nothing is said of a bill of exchange, or of the custom of merchants, yet the facts stated will apply to no other transaction. It appears, that ducats were to be given for pounds sterling; this was in fact an exchange. Again, the defendant promised to repay the original money advanced, with all damages and interest; this is the precise obligation of the drawer of a bill of exchange, according to the law-merchant. Besides, the transaction, if literally true, as set forth in the declaration, was, at least, a very uncommon one. A. is supposed to make I. C. his attorney, for the purpose of paying 110*l.* to B., and to receive a promise from B., that John of G. should pay to Reginald S. 443 ducats. And A. is also supposed to have made Reginald S. his attorney, for the purpose of receiving the ducats. Such a transaction must certainly be very rare, especially, as it was so much easier to have done the same thing in substance, by a simple bill of exchange.

In the oldest books extant in the English language on the subject of the law-merchant, viz., Malynes' Lex Mercatoria, written in 1622, and Marius's Advice, which appeared in 1651, it is said, that regularly there are four persons concerned in the negotiating a bill of exchange. A., a merchant in Hamburg, wanting to remit money to D., in England, pays his money to B., a banker in Hamburg, who draws a bill on C.,

his correspondent or factor in England, payable to D., in England, for value received of A. But in the declaration above recited, there are five persons concerned; and if, as is supposed, that transaction was upon a bill of exchange, the fifth person must have been an indorsee, or assignee of the bill. Another reason for supposing this to be the case, is, that Rastell has no other form of a declaration by an indorsee, although he has two by the payee, viz., one against an acceptor and one against a drawer.

*In the declaration of payee *v.* acceptor, fol. 338 a, the foreign merchant who paid the 1400 crowns to the drawer of the bill, in France, to be remitted to the plaintiff (the payee), in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant (the acceptor), so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in consideration of which it is averred that the defendant, in England, promised the plaintiff to pay him 414*l.* 3*s.* 4*d.*, lawful money of England. [*377

This declaration sets forth, that whereas, the plaintiff, on the 10th of June, 37 Eliz., at Rochelle, in France, in parts beyond seas, by the hands of a certain T. S., then the factor of the plaintiff, at the request of a certain R. W., then the factor of the defendant, delivered and paid to the said R. W., then factor of the defendant, to the use of the defendant, as much ready money as amounted to 1400 French crowns, of the money of France, in parts beyond sea, at the rate of 5*s.* 11*d.*, lawful money of England, for each French crown: And thereupon, the said R. W., at Rochelle aforesaid, then delivered to the said T. S., three bills of exchange, viz., first, second and third. In the first of which bills of exchange, the said R. W. requested the defendant to pay to the plaintiff, at L., 414*l.* 3*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of that bill of exchange (the second and third bills of exchange to the plaintiff not paid). It then sets forth the tenor of the second and third bills, and then avers, that the defendant, on the day and year first aforesaid, at the city of E., in the county of the said city, in consideration thereof, undertook, and to the plaintiff then and there and faithfully promised, that he, the defendant, well and faithfully would pay to the plaintiff, to the plaintiff's use, at the city of E. aforesaid, in the county of the said city, by way of exchange, according to the usage of merchants, the aforesaid 414*l.* 3*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith, that afterwards, viz., on the 1st of September, in the year aforesaid, at, &c., the first of the said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant, not regarding, &c., but contriving, &c., did not pay the said 414*l.* 3*s.* 4*d.*, &c., at the end of the said thirty days, &c. Whereby, the defendant lost the benefit of trading with the said 414*l.* 3*s.* 4*d.*, &c., to his damage 600*l.*

In this declaration, it will be perceived, that the custom of merchants is not alleged as the foundation of the action, or the cause of liability of the defendant; nor is it stated, that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to *pay the amount mentioned in the bill, in consideration of 1400 crowns paid to his use, in France; and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction, introduced for the purpose of adapting the custom of merchants to the common-law forms, and to show a sufficient consideration for the *assumpsit* The question of factorage was not traversable; as the facts of drawing the bill, and the drawee's acceptance, were sufficient evidence of the drawer's being the acceptor's factor *quoad hoc.* This fiction might, perhaps, be considered as part of the custom of merchants; but at any rate, it seems to have been considered necessary, in order to create that degree of privity between the payee and the acceptor which, at that time, was supposed necessary to support the action of *assumpsit.* *378

Both this and the former are declarations at common law; that is, neither of them is aided by the custom of merchants, unless the custom may be considered as supporting the fiction of factorage. They show also, that if privity of contract was necessary at common law, to support the action of *assumpsit*, the law would presume a

privity, or, at least, would presume facts which constituted a privity, between the payee and acceptor, or between an indorsee and a drawer of a bill of exchange. As in the latter declaration, the original advancer of the money to the drawer, in France, is presumed to be the factor of the payee (the plaintiff), so, in the former, Reginald S., (the payee) and I. C., the original advancer of the money, are presumed to be the factors of the plaintiff (the indorsee).

In 1 Brownlow's Declarations, printed in 1652, p. 267, is a declaration by the payee against the acceptor, in which the acceptor is alleged to be the factor of the drawer, but the original advancer of the money is not stated to be the factor of the plaintiff, as in the declarations in Rastell; although it is averred, that the original advancer of the money paid it to the drawer, with intent that it should be paid in England, by the drawer's factor (the drawee) to the plaintiff (the payee), which is the same thing; for if he paid with that intent, it was paid for the benefit of the payee. In the same volume, p. 269, is a declaration by payee *v.* drawer, in which the advancer of the money is expressly stated to be the factor of the plaintiff; but the drawee is not alleged to be the factor of the drawer. In both cases, the custom is stated to be between English merchants and foreigners, and their factors or servants. *Probably, at this time, it began to be considered as unnecessary to allege the intermediate parties on the bill to be the factors of the parties to the action, inasmuch as it was a mere fiction, the want of which was considered as supplied by an allegation of the custom.

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But in his second volume, printed in 1654, p. 58, there is another declaration by the payee v. acceptor of a bill of exchange, in which the payee is called the factor of the advancer of the money, and the drawee the factor of the drawer. There is also an averment of the custom. This declaration refers to Hilary term, 4 Jac. (Rot. 155), from whence it was probably taken.

In Browne's Vade Mecum (2d edit. 1695), p. 12, is a declaration by payee *v.* acceptor, alleging that the plaintiff himself paid the money to the drawer, who was the defendant's factor. It also sets forth the custom. In p. 16, is another, by payee against acceptor, like that in Rastell, fol. 338 a, alleging that the plaintiff's factor beyond sea, paid the money to the defendant's factor, who drew a bill on the defendant (his master), payable to the plaintiff, who showed and delivered it to the defendant, who, in consideration thereof, promised to pay, &c. This is a declaration at common law, and not on the custom. The date of the bill mentioned in the declaration is Sept. 10th, 1584 (26th of Eliz.), one year before the date of that in Rastell.

In p. 18, is another declaration at common law, by payee *v.* acceptor of a foreign bill, in the case of *Williamson* v. *Holiday* (Trin., 9 Jac., Rot. 712), in which it is alleged, that the plaintiff, by his factor, paid the money to the defendant's factor, for which he drew on the defendant, payable to the plaintiff, who showed it to the defendant, who accepted it, and in consideration of the premises, promised to pay, &c.

In p. 19, is a declaration by payee *v.* drawer, in which the plaintiff declares that he paid the defendant 45*l.*, for which the defendant drew and delivered to the plaintiff a bill of exchange on a certain Thomas Cole, at Venice, requiring him to pay to the plaintiff, for the defendant, 200 ducats, at two days sight; and in consideration of the premises, undertook and promised that he would, by the hands of the said Thomas Cole, in Venice, pay to the plaintiff the said 200 ducats. He then avers, that he showed the bill to Cole, who refused to pay, yet the defendant had not, by the hands of the said Cole, nor in any other manner, paid the ducats, &c.

*In p. 21, is a declaration at common law, by the original advancer of the money, to whose use the money was to be paid by way of exchange, against the drawer. It alleges, that the plaintiff paid the defendant, at his request, 100*l.* lawful money of England, for which the defendant drew a bill on I. W., at Middleburgh, requiring him to pay at usance, to one George Chandler, or bearer, to the use of the plaintiff, 174*l.* 11*s.* Flemish; and that in consideration of the premises, the defendant undertook, &c., that if the said I. W. should not accept the bill, nor pay the 174*l.* 11*s.* Flemish, according to the tenor of the bill, then the defendant would pay the plaintiff the original sum advanced, viz., 100*l.* lawful money of England. It then avers, that I. W. did not

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accept nor pay; and a protest for non-acceptance, and notice to defendant; yet he has not paid the 100*l.* &c.

These are the greater part of the precedents of declarations on bills of exchange, to be found in the printed books, before the statute of Anne; and in all of them, those facts are stated which bring the case within the principles which were considered as necessary to support the action of *assumpsit*, in general cases, at common law. In the more modern forms, the liability of the defendant, under the custom, is considered as a sufficient consideration to raise an *assumpsit*, without averring those intermediate steps which may be considered as the links of the chain of privity which connects the plaintiff with the defendant. The reason of this change of form was, probably, the consideration that those intermediate links were only fictions, or presumptions of law, which were never necessary to be stated.

These authorities tend to show that, in mercantile transactions, privity is not necessary to the foundation of an action; or that, if it is, the law will presume a privity. It will be seen, in the course of these observations, that privity is not necessary to support the action for money had and received, in any case.

III. Having thus seen how the law-merchant was understood, at the time of the statute of Anne, and the manner in which it was applied to the forms of judicial process, it will now be necessary to inquire, at what time the law-merchant was considered as applicable to inland bills, and what was the law respecting such bills and promissory notes, prior to the statutes of 9 & 10 Wm. III., c. 17, and 3 & 4 Ann., c. 9.

It is not ascertained exactly at what time inland bills first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange, under the law-merchant. But there was a time, when the law-merchant was considered as "confined *to cases where one of the parties [*381
was a merchant stranger," 3 Woodeson, 109; and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. This seems to have been the case, at the time when Malynes wrote his Lex Mercatoria, in the 4th page of which, he says, "He that continually dealeth in buying and selling of commodities, or by way of permutation of wares, both at home and abroad in foreign parts, is a merchant." It may be observed also, that Malynes takes no notice of inland bills; hence, we may presume, that they were not in use in his time. He dates his preface to the Lex Mercatoria, on the 25th of November 1622, and speaks of his book (p. 5) as the fruit of fifty years' experience. Marius (p. 2) says, that "Mr. John Trenchant, in his book of arithmetic, printed at Lyons, in Anno 1608, observes, that an exchange made in the same realm is not real." In the case of *Bromwich* v. *Loyd*, 2 Lutw. 1585 (Hil., 8 Wm. III., C. B.) Chief Justice Treby said, "that bills of exchange at first were extended only to merchant stranges, trading with English merchants; and afterwards, to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons, trading or not." And in *Buller* v. *Crips*, 6 Mod. 29 (2 Ann.), Lord Chief Justice Holt said, he remembered "when actions upon inland bills of exchange first began."

Perhaps Lord Holt might have been correct as to the time when actions upon inland bills first began, or rather when the first notice was taken of a difference between inland and foreign bills; but it appears probable, that inland bills were in use much before Lord Holt's remembrance. Marius first published his Advice concerning Bills of Exchange, in 1651, half a century before Lord Holt sat in the case of *Buller* v. *Crips*, as appears by Marius's preface to his second edition; and he there says, he has been twenty-four years a notary-public, and in the practice of protesting "inland instruments and outland instruments." In p. 2, speaking of a bill between merchants in England, he says, it is "in all things as effectual and binding as any bill of exchange made beyond seas, and payable here in England, which we used to call an outland bill, and the other an inland bill." If we go back twenty-four years from 1651, the time when Marius first published his Advice, it will bring us to the year 1627; but if we go back twenty-four years from 1670, the probable date of his 2d edition (which was probably his meaning), it will give us the year 1646, as the earliest date to which we

can trace them. As Malynes, in his Lex Mercatoria, of 1622, does not notice them, and as Marius mentions them as existing in 1646, it seems probable, that they began to be in use between those two periods. Kyd, in his Treatise on Bills, p. 13 (Dublin edition, 1791), speaking of promissory *notes, says, "the period of their introduction appears to have been about thirty years before the reign of Queen Anne;" *382] but the only authority he cites is 6 Mod. 30 (2 Ann.), the case of *Buller* v. *Crips*, above mentioned, in which Lord Holt says, he had consulted two of the most famous merchants in London, who informed him, that "it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years." This expression, it will be observed, does not restrict the period to that limit, and it is probable, that thirty years was a loose expression, and as far back perhaps as those merchants could carry their recollection of any mercantile transaction. It is certain, that promissory notes were in use upon the continent, in those commercial cities and towns with which England carried on the greatest trade, long before that period; and were negotiable under the custom of merchants, in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his Lex Mercatoria, p. 71, 72, &c., where he gives the form of such a bill, which is copied by Molloy, in p. 447 (7th edition, London, 1722), and will be found in substance exactly like a modern promissory note. "I, A. B., merchant of Amsterdam, do, by these presents, acknowledge to be indebted to the honest C. D., English merchant, dwelling at Middleborough, in the sum of 500*l.* current money, for merchandise, which is for commodities received of him to my content; which sum of 500*l.* as aforesaid, I do hereby promise to pay unto the said C. D. (or the bringer hereof), within six months after the date of these presents. In witness whereof, I have subscribed the same, at Amsterdam, this ——— day of July, ———." This is nothing more than a verbose promissory note, which, stripped of its redundancies, is simply this: For value received, I promise to pay to C. D., or bearer, 500*l.* in six months after date.

In p. 72, speaking of these bills obligatory, he says, "The sincerity of plain dealing hath been hitherto inviolable, in the making of the said bills, which every man of credit and reputation giveth of his own handwriting, or made by his servant, and subscribed by him, without any seal or witness thereto; and is made payable to such a merchant or person, or to the bearer of the bill, at such times of payment as is agreed."

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity *of the latter is greater *383] than that of the former, and that they were more certainly within the custom of merchants. Indeed, there is a case prior to any in the books upon inland bills, which is believed to have brought upon such a promissory note, or bill obligatory, as is described by Malynes. It is in Godbolt 49 (Mich., 28 & 29 Eliz., Anno 1586), "An action of debt was brought upon a *concessit solvere*, according to the law-merchant, and the custom of the city of Bristow, and an exception was taken, because the plaintiff did not make mention in the declaration of the custom; but because in the end of his plea he said '*protestando, se sequi querelam secundum consuetudinem civitatis Bristow*,' the same was awarded to be good; and the exception disallowed."

Lord Ch. Baron Comyns, in his Digest, tit. Merchant, F. 1, F. 2, in abridging the substance of what Malynes had said upon the subject of bills of debt, or bills obligatory, does not hesitate to state the law to be, that "payment by a merchant shall be made in money or by bill. Payment by bill, is by bill of debt, bill of credit or bill of exchange. A bill of debt, or bill obligatory is, when a merchant by his writing acknowledges himself in debt to another in such a sum, to be paid at such a day, and subscribes it, at a day and place certain. Sometimes, a seal is put to it. But such bill binds by the custom of merchants, without seal, witness or delivery. So it may be made payable to bearer, and upon demand. So, it is sufficient, if it be made and subscribed by the merchant's servant. So, a bill of debt may be assigned to another

toties quoties. And now by the stat. 3 & 4 Anne, c. 9, all notes in writing, made and signed by any person, or the servant or agent," &c. (reciting the terms of the statute). By thus arranging his quotations from Malynes under the same head with the statute of Anne respecting promissory notes, it is to be inferred, that he considered the custom of merchants, respecting bills of debt, as stated by Malynes, to be the cause or origin of the statute respecting promissory notes; and by connecting the former with the latter by the conjunction "and," it seems to be strongly implied, that he considered the statute only as a confirmation of what was law before. That he was correct in this opinion, and that the foreign custom of merchants respecting promissory notes, mentioned by Malynes, was gradually and imperceptibly engrafted into the English law-merchant, at the same time, and under the same sanction with inland bills, and that that custom was acknowledged repeatedly by solemn legal adjudications in the English courts, before the statute of Anne, will probably be admitted when the authorities are examined, which will be presented in the following pages. A greater degree of weight will be attached to the opinion of Comyns, when it is recollected, that he was either at the bar or on the bench, during the reigns of *King William III., Queen Anne, Geo. I. and Geo. II., and must, therefore, have known how the law stood before the [*384 statute, what motives produced it, and what was the true intent of the parliament in passing it.

Anderson, in his History of Commerce, relates a number of facts which may throw some light upon this subject. In vol. 1, p. 171, speaking of the great antiquity of bills of exchange, he mentions a charter granted by the emperor Barbarossa to the city of Hamburg, Anno 1189, in which one of their rights is "to negotiate money by exchange." He observes also, that bills of exchange were very new, at this time, in Europe, and were then in use only in the most considerable commercial cities. In p. 204, he says, that re-exchange, by way of damages, was first invented by the Ghibelines, when driven out of Italy by the Guelphs; and in p. 274, bills of exchange were known in England, Anno 1307, about the last year of the reign of Edw. I., and are alluded to in the statutes of 5 Ric. II., c. 3, Anno 1381; and 14 Ric. II., c. 2, Anno 1390. They are also mentioned Anno 1406, and are called *literæ Cambii.* Hence, it appears, that for a period of nearly 350 years, the custom of merchants respecting bills of exchange was considered as confined to foreign bills, and it is now upwards of 150 years since it has been allowed to extend to inland bills.

The time when inland bills and promissory notes began to be in general use in England, was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, p. 386, 402, 484, 492, 493, 519 and 520. In the year 1638 or 1640, King Charles forcibly borrowed 200,000*l.* of the merchants of London, "who had lodged their money in the king's mint, in the tower, which place, before banking with goldsmiths came into use, in London, was made a kind of bank or repository for merchants therein safely to lodge their money; but which, after this compulsory loan, was never trusted in that way any more. Afterwards, they generally trusted their cash with their servants, until the civil war broke out, when it was very customary for their apprentices and clerks to leave their masters, and go into the army. Whereupon, the merchants began, about the year 1645, to lodge their cash in goldsmiths' hands, both to receive and pay for them; until which time, the whole and proper business of London goldsmiths was, to buy and sell plate and foreign coins of gold and silver," &c.

* "This account, says Anderson, "we have from a scarce and most curious [*385 small pamphlet, printed in 1676, entitled 'The mystery of the new-fashioned goldsmiths or bankers discovered, in eight quarto pages,' from which he extracts the following passage: 'Such merchants' servants as still kept their masters' running cash, had fallen into a way of clandestinely lending it to the goldsmiths at four pence per cent. per diem; who, by these and such like means, were enabled to lend out great quantities of cash to necessitous merchants and others, weekly or monthly, at high interest; and also began to discount the merchants' bills, at the like or a higher rate of interest. That much about this time, they (the goldsmiths or new-fashioned bank-

ers) began to receive the rents of gentlemen's estates remitted to town, and to allow them and others, who put cash into their hands, some interest for it, if it remained a single month in their hands, or even a lesser time. This was a great allurement for people to put their money into their hands, which would bear interest until the day they wanted it; and they could also draw it out by 100*l.* or 50*l.* &c., at a time, as they wanted it, with infinitely less trouble than if they had lent it out on either real or personal security. The consequence was, that it quickly brought a great quantity of cash into their hands; so that the chief or greater part of them were now enabled to supply Cromwell with money, in advance on the revenues, as his occasions required, upon great advantage to themselves."

"After the restoration, King Charles being in want of money, they took ten per cent. of him barefacedly; and by private contract on many bills, orders, tallies and debts of that king, they got twenty, sometimes thirty per cent. to the great dishonor of the government. This great gain induced the goldsmiths to become more and more lenders to the king; to anticipate all the revenue; to take every grant of parliament into pawn, as soon as it was given; also to outvie each other in buying and taking to pawn, bills, orders and tallies; so that in effect all the revenue passed through their hands. And so they went on, till the fatal shutting of the exchequer, in the year 1672."

"The banking trade was in its greatest height in 1667, when the Dutch burnt some ships at Chatham. But that disaster causing a run on the bankers, it in some measure lessened their future credit, which was entirely ruined by the shutting up of the exchequer, five years after; by which they were prevented from drawing out the money weekly, as it came in, so as to answer the demands upon them. The consequence was, their failure for nearly a million and a half sterling, which sum they were in advance to the king; and the ruin or injury of 10,000 families."

*386] *This short history of the goldsmiths will account for the sudden increase of paper credit, after the year 1645, and renders it extremely probable, that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact, from the cases in the books; upon examining which, we shall find, that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes, they were called "bills or notes." Neither the word "inland," nor the word "promissory," was at this time in use, as applied to distinguish the one species of paper from the other. The term "promissory note" does not seem to have obtained a general use, until after the statute. There was no distinction made, either by the bench, by the bar, or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II., James II., and King William, of which Lord Mansfield complained so much in the case of *Grant* v. *Vaughan*, 3 Burr. 1525, and 1 W. Bl. 488; where he says, that in all the cases in King William's time "there is great confusion; for without searching the record, one cannot tell whether they arose upon promissory notes, or inland bills of exchange. For the reporters do not express themselves with sufficient precision, but use the words 'note' and 'bill' promiscuously." This want of precision is apparent enough to us, who now (since the decision of Lord Holt in the case of *Clerk* v. *Martin*) read the cases decided by him before that time; but at the time of reporting them, there was no want of precision in the reporter, for there was not, in fact, and never had been suggested, a difference in law between a promissory note and an inland bill. They both came into use at the same time, were of equal benefit to commerce, depended upon the same principles, and were supported by the same law.

IV. The case of *Edgar* v. *Chut*, or *Chat* v. *Edgar*, reported in 1 Keb. 592, 636 (Mich. 15 Car. II., Anno 1663), seems to be the first in the books which appears clearly to be upon an inland bill of exchange. Without doubt, many had preceded it, and passed *sub silentio*. The case was this: A butcher had bought cattle of a grazier, but not having the money to pay for them, and knowing that the parson of the parish had money in London, he obtained (by promising to pay for it) the parson's order or bill on his cor-

respondent, a merchant in London, in favor of the grazier. The parson having doubts of the credit of the butcher, wrote secretly to his correspondent, not to pay the money to the grazier, until the butcher had paid the parson. In consequence of which, the London merchant did not pay the draft, and the grazier brought his suit against the parson, and declared on the *custom of merchants. It was moved in arrest of judgment, that neither the drawer nor the payee was a merchant; but it was held to be sufficient, that the drawee was a merchant. [*387

Next came the case of *Woodward* v. *Row* (Mich., 18 Car. II., Anno 1666), 2 Keb. 105, 132, in which the court said, that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant; and they will intend that he of whom the value is said to be received by the defendant, was the plaintiff's servant."

The next is *Milton's Case* (Mich., 20 Car. II.), Hardr. 485, of which it may be necessary to take notice, as it has been considered as a leading case, and as having established some principles upon which a number of subsequent cases have been decided. It was an action of debt, in the exchequer, upon a bill of exchange accepted. The plaintiff declared, that by the custom of England, if a merchant send a bill of exchange to another merchant, to pay money to another person, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted; *per quod actio accrevit.* Upon *nil debet* pleaded, the verdict was for the plaintiff. A motion was made in arrest of judgment, and one of the reasons assigned was, that there was "no privity between the plaintiff and defendant," "nor any contract in deed or in law."

The Chief Baron, among other things, said, that "without doubt, if the common law, or the custom of the place, create a duty, debt lies for it; as in the case of a toll due by custom (20 Hen. VII., and so in cases of a certain sum due by custom, for pound breach to the lord of the manor, or to a jailer for bar fees, 21 Hen. VII.). But the great question here is, whether or no a debt or duty be hereby raised: for if it be no more than a collateral engagement, order or promise, debt lies not, as in the case that has been cited, of goods delivered by A. to B., at the request of C., which C. promiseth to pay for, if the other does not; for in that case a debt or duty does not arise betwixt A. and C., but a collateral obligation only. In our case, the acceptance of the bill amounts clearly to a promise to pay the money; but it may be a question whether it amounts to a debt or not."

Precedents were ordered to be searched; but none being found, the court, afterwards, in Hilary term, 20 & 21 Car. II., declared their opinions, "that an action of debt would not lie upon a bill of exchange *accepted, against the acceptor; but that a special action upon the case must be brought against him. For the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c., if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills, being a general custom among all traders, both within and without the realm, and having everywhere that effect as to make the acceptor liable to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt; it only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in the case of toll; and so in case of a fine for a copyhold. Wherefore, and because no precedent could be produced that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested." [*388

The ground of this judgment seems to be, that the drawer is the original debtor, and that the undertaking of the acceptor is only to pay the drawer's debt; and therefore, is a collateral and not an original engagement. If the court were mistaken in this position, the case is not law; or, at least, the reason of the case fails. It may be true, that the drawer is the original debtor, until the bill is accepted; but after the bill is accepted, the acceptor is the original debtor, and the undertaking of the drawer is col-

lateral, viz., to pay in case the acceptor does not. The question in the case of *Heylin* v. *Adamson*, 2 Burr. 674, was, who was the original debtor in a bill of exchange. Lord MANSFIELD said, "a bill of exchange is an order or command to the drawee, who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted, he is the original debtor." If so, a duty is certainly created by the acceptance, and according to the Chief Baron's own admission, "debt lies for it." In the same case of *Heylin* v. *Adamson*, Lord MANSFIELD states the law to be the same respecting the maker of a promissory note, as the acceptor of a bill of exchange; yet it has been held, in the cases of *Rumbald* v. *Ball*, 10 Mod. 38; *Rudder* v. *Price*, 1 H. Bl. 547, and *Bishop* v. *Young*, 2 Bos. & Pul. 78, that debt lies against the maker of a promissory note. See also Chitty on Bills, 220, where the authority of the case in Hardres 485, is doubted.

The next case is that of *Brown* v. *London*, reported in 1 Vent. 152; 1 Lev. 298; 1 Mod. 285; and 2 Keb. 695, 713, 726, 758, 822 (Mich., 22 Car. II., Anno 1670), in which
*389] it was decided, upon the authority of *Milton's Case*, Hardr. 485, that *indebitatus assumpsit* would not lie upon *the acceptance of a bill of exchange. This case was not decided on the ground of want of privity, because it is said by the court, that "if A. delivers money to B. to pay to C., and gives C. a bill of exchange drawn on B., and B. accepts the bill, and doth not pay it, C. may bring an *indebitatus assumpsit* against B., as having received money to his use: but then he must not declare only on a bill of exchange accepted, as the case at bar is." And in the case of *Rables* v. *Sikes*, at the same term, 2 Keb. 711, such a declaration of *indebitatus assumpsit* for money had and received, in case of a bill of exchange, was adjudged good, upon demurrer.

The case of *Baker* v. *Hill* (Pasch., 28 Car. II.), 3 Keb. 627, is the next which occurs in the books. This is said by the reporter to be "Debt on inland bill by custom of merchants." This appears to be the first case in which the term "inland bill" is used, but it furnishes no evidence that the case was not upon a promissory note; for it will be observed by any one who will take the trouble to examine the cases prior to the judgment in the case of *Clerk* v. *Martin* (1 Anne), that the term promissory note was not in use, nor had they any technical name by which to distinguish a promissory note from an inland bill of exchange, unless it was by calling the former an inland bill, and the latter an inland bill of exchange. In the case of *Baker* v. *Hill*, the circumstance of its being an action of debt, induces a suspicion that it was a promissory note, because we have already seen that in the case of a bill of exchange, it had been decided in Hardr. 485, that an action of debt would not lie.

In the next case, which is "against *Elborough*" (Pasch., 28 Car. II.), 3 Keb. 765, it seems doubtful, whether it was a promissory note, or an inland bill of exchange. It is a short note of a case, in these words: "In action upon the case, on custom of London, that any merchant or other inhabitant there, subscribing a note for payment of money to any other, not said where inhabiting; on default of payment by him on whom the bill is drawn, should pay, &c. Thompson excepted, in arrest of judgment, that no action lieth, as between merchants it doeth; *sed non allocatur*, for, *per curiam*, there is as much reason for inland bills, as for bills of exchange, and this is no more, and being averred that the defendant is an inhabitant in L. &c., judgment for the plaintiff."

The case of *Shelden* v. *Hentley*, 2 Show. 161 (33 Car. II., B. R., Anno 1680), was "upon a note under seal, whereby the defendant promised to pay to the bearer thereof, upon delivery of the note, 100*l.*, and avers that it was delivered to him (meaning the
*390] defendant), by the bearer thereof, and that he (the plaintiff) was so." *It was objected, that this was no deed, because there was no person named in the deed to take by it. But it was answered, that it was not a deed until delivered, and then it was a deed to the plaintiff. COURT.—The person seems sufficiently described, at the time that 'tis made a deed, which is at its delivery: and suppose, a bond were now made to the Lord Mayor of London, and the party seals it, and after this man's mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *et traditio facit chartam loqui.* And by the delivery, he expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall

be paid. But Mr. Justice JONES said, it was the custom of merchants that made that good. Here, it will be observed, that the court, in order to elucidate the subject before them, refer to principles of law more certain and better known, viz., that a promissory note payable to bearer is good, and that promissory notes were within the custom of merchants.

Then followed the case of *Norfolk* v. *Howard* (Trin., 34 Car. II., B. R., Anno 1681), 2 Show. 235, which was "case upon special promise, on a note, wherein the defendant promised to pay unto the plaintiff 50*l.*, at any time during the joint lives of plaintiff and defendant, within three months after the plaintiff should demand the same; and no demand *modo et forma* pleaded." The demand proved was by plaintiff's attorney, who delivered a demand in writing, at the defendant's house, to his maid, by whom it was sent up to the defendant, being sick and not to be spoken with; the maid brought down word, she had delivered it to her master — held, no good evidence to maintain the action, for the demand ought to be personal. No objection was made to the form of the action; it was only to the sufficiency of the demand.

The next case is *Hinton's* (Mich., 34 Car. II., Anno 1681), 2 Show. 235, which is said to be, "Case on a bill of exchange against the drawer. Bill not being paid, and payable to I. S., or to the bearer, the plaintiff brings the action as bearer; and upon evidence, ruled by the Lord PEMBERTON, that he must entitle himself to it, on a valuable consideration, though among bankers, they never make indorsements in such case; for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." It does not appear, that this is not an action on a promissory note. It seems to have been either a banker's promissory note, or a check drawn on a banker, and at this time, no difference was supposed to exist as to the law in those cases. But it expresses a clear opinion, that the bearer of such a note or bill *may maintain an action in his own name, if he came fairly by the bill. And although this principle was denied [*391 in the subsequent cases of *Horton* v. *Coggs*, *Hodges* v. *Steward*, and *Nicholson* v. *Sedgwick*, yet these again were expressly overruled and denied to be law by Lord MANSFIELD and the rest of the judges, in the case of *Grant* v. *Vaughan*, 3 Burr. 1516, in which case, the reasoning of the court applies as strongly to the case of a promissory note, as to that of an inland bill of exchange.

In the case of *Claxton* v. *Swift*, in the exchequer, on a writ of error (Hil., 36 & 37 Car. II., Anno 1684), 1 Lutw. 878, it was decided, upon an inland bill, "that the first drawer of the bill and every indorser is liable to the payment of a sum certain to the last indorsee." No difference was then taken between an inland bill and a promissory note; both were considered as being within the custom. So that what is stated to be law as to one, may be considered to be law as to the other.

In the cases of *Cramlington* v. *Evans* (Trin., 3 Jac. II.), 2 Vent. 296, and *Ewers* v. *Benchkin* (Mich., 4 Jac. II.), 1 Lutw. 231, the pleadings are set forth at large, and show the manner of declaring upon the custom as to inland bills.

The case of *Darrach* v. *Savage* (Pasch., 2 W. & M., Anno 1689), 1 Show. 155, was "*indebitatus assumpsit* for 40*l.* received to the plaintiff's use; *non assumpsit* pleaded; and upon the trial, the evidence was a bill of exchange, or note under the defendant's hand, dated the 22d February 1687, directed to a merchant in London, 'pray pay to Mr. Darrach, or his order, the sum of 40*l.*, and place it to my account, value received, witness my hand.'" This case shows that a bill or note was good evidence in an action for money had and received; and that no distinction was made between a bill and a note.

Horton v. *Coggs* (Mich., 2 W. & M., C. B., Anno 1689), 3 Lev. 299, was clearly upon a promissory note, yet in the margin it is called "*assumpsit sur bill de exchange.*" The plaintiff "declared upon a custom in London, that if any merchant, or other person merchandising in London, make a note in writing, under his hand, and thereby promise to pay any sum of money therein contained, to a person therein named or bearer; and if the person in the note named, to whom by the note it was promised to be paid, assign or deliver it to any other person, to receive it to his own use, and he bring it to the drawer *of the note, and request him to pay it to him who brings the note, then the person who made the note was chargeable to pay it to the bearer. And that [*392

the defendant, being a goldsmith, made such a note, thereby promising to pay 100*l.* to William Barlow, or the bearer; and that Barlow delivered the note to the plaintiff, to receive the money to his own use, in satisfaction of 100*l.* due to him by Barlow; and that the plaintiff brought and showed this to the defendant, and requested him to pay the 100*l.*, which he had not done, whereby, by the custom, he became chargeable, and so being chargeable, assumed to pay. After verdict for the plaintiff, it was moved in arrest, &c., that this custom to pay to bearer was too general; for perhaps, the goldsmith, before notice by the bearer, had paid this to Barlow himself. (And this was at bar now alleged to be the truth of the case.) And of such opinion, after divers motions in Hilary term, and this term, were POLLEXFEN, POWELL, and ROKEBY; VENTRIS being dead in the last vacation. Although, upon the trial of the cause, before POLLEXFEN, at Guildhall, he then held, that the action well lay, this matter being objected at the trial. Levinz, of counsel for the plaintiff." In this case, the only objection was, that a custom to pay to bearer was too general. It seems to be admitted, that Barlow himself might have brought an action upon the custom; and that a custom to pay to order, or to indorsee, would have been good. It is a sufficient answer to this case, that in the case of *Grant* v. *Vaughan*, 3 Burr. 1516, it was declared not to have been law, so far as it decided that an action could not be maintained by the bearer of such a note, in his own name.

The case of *Dehers* v. *Harriot* (Trin., 2 W. & M.), 1 Show. 163, was this: "A. draws a first and second bill of exchange, payable by himself, in Dublin, to B. or order," who indorsed to the plaintiff. No question was made as to this being a bill of exchange; and yet it differs in nothing but in form from a promissory note.

The next case is *Hodges* v. *Steward* (Pasch., 5 W. & M.), reported in Comb. 204; 1 Salk. 125; 12 Mod. 36; and Holt 115. The case is thus shortly stated by Comberbach: "Case, upon a bill of exchange: custom was laid in London, that where a bill is payable to A. or bearer, it must be paid to the indorsee. HOLT, Chief Justice, said, it was repugnant; for another person, and not the indorsee, might be the bearer." This seems to be the true ground of the decision, although the reasons are variously stated by the different reporters. They all call it a bill of exchange, but in 12 Mod. 36, we are informed what kind of a bill of exchange it was, viz., a bill drawn by the *defendant on himself, payable to another or bearer. The payee indorsed it and the indorsee, as such, and not as bearer, brought the action, which was held not to lie; because no authority was given to the payee to indorse, or to transfer it by indorsement. And in 1 Salk. 125, it appears, that in the same case, a difference was taken between a bill payable to bearer, and to order; for a bill payable to "I. S., or bearer, is not assignable by the contract, so as to enable the indorsee to bring an action; because there is no such authority given to the party by the first contract." "But when the bill is payable to I. S., or order, there an express power is given to the party to assign, and the indorsee may maintain an action." It was also said, that although such an indorsement is not a good assignment of the bill, so as to charge the drawer; yet it is a good bill betwen the indorser and indorsee; and the indorser is not liable to an action for the money, "for the indorsement is in nature of a new bill." It was also held (as it had been before adjudged in *Milton's Case*, Hardr. 485, and in *Brown and London's Case*, 1 Vent. 152), that a general *indebitatus assumpsit* would not lie on a bill of exchange, but that the action must be either a general *indebitatus assumpsit* for money had and received, or a special action upon the case, grounded on the custom. Upon this case, it may be remarked, that a bill drawn by a man on himself is precisely a promissory note in effect; and Lovelass, in his treatise on Bills and Notes, p. 22, expressly says, "that the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing." Marius, also, in his Advice, p. 3, says, "a bill may be by two persons, as where the drawer makes the bill payable to himself or order," so where a man draws a bill on himself. The same is said by Kyd on Bills, p. 2, and Chitty, 22, 48, says, "a bill will be valid, where there is only one party to it, for a man may draw on himself, payable to his own order; but in

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such case, it is said, that the instrument is more in the nature of a promissory note than a bill of exchange."

The next case is that of *Hill et al.* v. *Lewis* (Hil., 5 W. & M., B. R.), 1 Salk. 132. This was an action by the holder against the indorser of two notes subscribed by one Moore, a goldsmith, payable to the defendant, and by him indorsed in blank, and delivered to one Zouch, to whom he was indebted. Zouch delivered them, so indorsed, to the plaintiffs, and received from the plaintiffs therefor, other bills and some cash. One of the notes was payable to the defendant or order, the other was payable to the defendant, without the words "or order." Moore broke and ran away; the plaintiff declared, 1st. Upon two bills of exchange against the indorser; 2d. Upon a *mutuatus;* 3d. Upon *an *indebitatus assumpsit* for money laid out for the use [*394 of the defendant. And the principal question was, whether the plaintiffs had used due dilligence in applying to Moore for the money. Holt, Chief Justice, held, "That goldsmiths' bills were governed by the same laws and customs as other bills of exchange; and every indorsement is a new bill: and so long as a bill is in agitation (circulation), and such indorsements are made, all the indorsers, and every of them, are liable as a new drawer. That by the law, generally, every indorser is liable as the first drawer, and cannot be discharged, without an actual payment; and is not discharged by the acceptance (receipt) of the bill by the indorsee; but by the custom this is restrained, viz., the acceptance (receipt) is intended to be upon this agreement, sct., that the indorsee will receive it of the first drawer, if he can, and if he cannot, then that the indorser will answer it; as, if the first drawer be insolvent, at the time of the indorsement, or upon demand, refuses to pay it, or cannot be found. And the indorser is not discharged, without actual payment, until there be some neglect or default in the indorsee, as if he does not endeavor to receive it, in convenient time, and then the first drawer becomes insolvent." "He left it to the jury to consider, whether the time in this case were convenient time or not; and if the plaintiff had convenient time to receive his money, then to find for the defendant, otherwise, for the plaintiff. And they, upon consideration, found for the plaintiff; upon which the plaintiff prayed to take the verdict upon the *indebitatus assumpsit. Et per* Chief Justice.—You cannot take the verdict upon any part of the declaration but that to which evidence was given, and here it will be good, if found upon the bills of exchange; but if the evidence be applicable to any other part of the declaration, you may take it upon any such part to which the evidence is applicable. And because Zouch had sworn, that he received the benefit of, and had been satisfied with, the bill he took of the plaintiff, by which the defendant was discharged against Zouch, the verdict was taken upon the *indebitatus assumpsit* for money laid out for the defendant's use; and it seemeth, the indorsement by the defendant to the plaintiff was good evidence of a request to pay the said money to Zouch. Now, exception was taken that one bill was payable to the defendant only, without the words 'or his order,' and, therefore, not assignable by the indorsement; and the chief justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words 'or to his order,' give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer that he would answer it to the assignee; but the indorsement of the bill which has not the words 'or to his order' is good, or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee." This case *certainly [*395 ought to have been considered as settling the law upon promissory notes. Lord Holt here admits that promissory notes are "governed by the same laws and customs as other bills of exchange;" and that if the verdict had been taken upon the count which declared upon the notes, as bills of exchange, it would have been good. His reasons why a note to order is assignable, viz., "that the words 'or to his order,' give authority to the plaintiff to assign it by indorsement; and that 'tis an agreement by the first drawer that he would answer it to the assignee," are certainly good; and are the same which were used in several modern cases which will be noticed hereafter. The observation is also important "that the indorsement by the defendant to the plaintiff was good evidence of a request to pay the money to Zouch." We shall have occa-

sion to refer to this case again, when we come to consider the cases of *Clerk* v. *Martin*, and *Buller* v. *Crips*, decided about nine years afterwards.

The case of *Pearson* v. *Garret* occurred in the next term (Anno 1693), and is reported in Comb. 227; and 4 Mod. 242. "The action was brought upon a note for the payment of sixty guineas, when the defendant should marry such a person, &c., in which the plaintiff declared as upon a bill of exchange setting forth the custom of merchants," &c. This note appears by the declaration, which is stated at length, 4 Mod. 242, to be dated 21st October, 4 W. & M., by which the defendant "promised to pay to the plaintiff, or his assigns, sixty guineas, in two months after the defendant should be lawfully married to one Elizabeth Pretty." It was objected, that this was "only an agreement founded upon a brokage, and, therefore, not within the custom of merchants; neither were there ever yet any precedents to pay money upon such a collateral contingency." The judgment was for the defendant; and it was said, that, "if the note had been given by way of commerce, it had been good; but to pay money upon such a contingency, cannot be called trading, and therefore, not within the custom of merchants."

If any doubt could remain, that the case of *Hill* v. *Lewis* had fully settled the law, that promissory notes were within the custom of merchants, that doubt must have been completely removed by the case of *Williams* v. *Williams*, decided at the next term in the same year, in the king's bench (viz., Pasch., 5 W. & M., Anno 1692), Carth. 269. "The plaintiff, Thomas Williams, being a goldsmith in Lombard street, brought an action on the case against Joseph Williams, the projector of the diving engine, and declared upon a note drawn by one *John Pullin, by which he promised to pay
*396] 12*l.* 10*s.* to the said Joseph Williams, on a day certain; and he indorsed the note to one Daniel Foe, who indorsed it to the plaintiff, for like value received. And now, the plaintiff, as second indorsee, declared in this manner, viz., "that the city of London is an ancient city, and that there is, and from the time to the contrary whereof the memory of man doth not exist, there hath been, a certain ancient and laudable custom among merchants, and other persons residing and exercising commerce, within this realm of England, used and approved, viz., &c. So sets forth the custom of merchants concerning notes so drawn and indorsed *ut supra*, by which the first indorser is made liable, as well as the second, upon failure of the drawer, and then sets forth the fact thus, viz.: And whereas also, a certain John Pullin, who had commerce by way of merchandising, &c., on such a day, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made a certain bill or note in writing, subscribed with his name, bearing date, &c., and by the said bill or note, promised to pay, &c., setting forth the note; and further, that it was indorsed by the defendant to Foe, and by Foe to the plaintiff, according to the usage and custom of merchants; and that the drawer having notice thereof, refused to pay the money, whereby the defendant, according to the usage and custom of merchants, became liable to the plaintiff, and in consideration thereof, promised to pay it, &c., alleging that they were all persons who traded by way of merchandise, &c.

"To this, the defendant pleaded a frivolous plea, and the plaintiff demurred; and upon the first opening of the matter, had judgment in B. R. And now, the defendant brought a writ of error in the exchequer chamber, and the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is), but had declared on a custom through all England, and if so, it is the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place, from whence a venue might arise to try it. To which it was answered, that this custom of merchants concerning bills of exchange is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter* v. *Downish*, and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person, according to the usage and custom of merchants,
drew the bill; therefore, all the matter in the declaration concerning the special
*397] *custom was merely surplusage, and the declaration good without it. The judgment was affirmed."

There cannot be a stronger case than this. On demurrer, judgment was rendered for the plaintiff in the king's bench, which judgment was affirmed, upon argument, upon a writ of error in the exchequer chamber, on the very point of the custom; so that here was the unanimous concurrence of all the judges of England. This case, it is believed, has never been denied to be law, either before or since the statute of Anne. A short note of this case is to be found in 3 Salk. 68, by the name of *Williams* v. *Field*, in these words, "Ruled, that where a bill is drawn payable to W. R., or order, and he indorses it to B., who indorses it to C., and he indorses it to D., the last indorsee may bring an action against any of the indorsers, because every indorsement is a new bill, and implies a warranty by the indorser, that the money shall be paid."

The next case upon a promissory note is that of *Bromwich* v. *Lloyd* (Hil., 8 W. III., C. B., Anno 1696), 2 Lutw. 1582, where the pleadings are set forth at full length, in which the plaintiff declares, that "at London aforesaid, viz., in the parish, &c., there is a custom, that if any merchant or other person residing and trading at London, make any note, with his proper hand subscribed, and thereby promise to pay to any other person dwelling at London, any sum in such note specified, then such person who subscribed such note, by reason thereof, and by the said custom, is liable to pay the money, &c. That the defendant, 8th June 1696, residing and dealing at London, made a note, &c., and thereby promised to pay to the plaintiff, at London aforesaid, in the parish and ward aforesaid residing, 26*l.* 10*s.* 9*d.*, on demand, by reason whereof, &c. To this, the defendant pleaded, that at the time of making the said note, he was resident at Brentford, &c., *absque hoc*, that he was resident at London. To which plea, the plaintiff demurred, for that the defendant had traversed matter not traversable, and because it tended to the general issue," &c.

It was urged, for the defendant, that the custom was laid in St. Mary le Bow, but in fact, is extended to London, and was therefore contradictory. *Sed non allocatur*, "for, *per curiam*, the parish is mentioned *but in respect of the venue, and that [*398 it was matter of necessity to allege it so." And it was further said, for the defendant, "that there were three things necessary to maintain the action, viz.: 1. Commorancy; 2. The making of the note; 3. Commerce between the parties; but there is no place mentioned in the declaration, where the note was made: *sed non allocatur*, for it shall be intended at the parish of St. Mary le Bow; for it is said, that the defendant, at London aforesaid, in the parish and ward aforesaid, residing and using commerce, made a note; and therefore, the whole is to be intended at the same place. It was also objected, that the custom was unreasonable, because it took away the proof how the money became due; but the court were of opinion, that the custom was good, notwithstanding this objection.

"Treby, Chief Justice, said, in this case, that bills of exchange, at first, were extended only to merchant strangers, trading with English merchants, and afterwards to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons, trading or not; and that there was no occasion to allege any custom; and that was not denied by any of the other justices. And the chief justice also said, that bills of exchange were of such general use and benefit, that on an *indebitatus assumpsit*, a bill of exchange may be given in evidence to maintain the action; and Powell, Justice, said, that on a general *indebitatus assumpsit* for money received to the use of the plaintiff, such bills may be left to the jury to determine whether it was for value received, or not. In Hil., 9 & 10 Wm. III., the plaintiff had judgment, by the opinions of the whole court." This case is in perfect conformity to those of *Hill* v. *Lewis*, and *Williams* v. *Williams*.

The case of *Pinckney* v. *Hall* (Hil., 8 & 9 Wm. III., Anno 1697, B. R.), 1 Ld. Raym. 175, was by the indorsee of a promissory note, made by the defendant, for himself and partner, as joint merchants, to Hutchins, or order, and by him indorsed to the plaintiff. The declaration was on the custom of England, to which the defendant demurred. 1st. "Because the declaration being *per consuetudinem Angliæ*, &c., was ill, for the custom of England is the law of England, of which the judges ought to take notice, without pleading. *Sed non allocatur.* For though heretofore this has been al-

lowed, yet, of late time, it has always been overruled, and in an action against a carrier, it is always laid *per consuetudinem Angliæ*. 2. Though *lex mercatoria* is part of the *399] *law of England, yet it is but a particular custom among merchants, and therefore, it ought to be shown in London, or some other particular place. *Sed non allocatur;* for the custom is not restrained to any particular place." Two other exceptions were taken, which are not material to the present question; but judgment was given for the plaintiff.

At the next term (Easter, 9 Wm. III.), 1 Ld. Raym. 180, occurred the case of *Nicholson* v. *Sedgwick*, reported also in 3 Salk. 67, where it is stated to be upon a bill. "The defendant Sedgwick, being a goldsmith, made a note in writing, by which he promised to pay to one Mason, or to the bearer thereof, 100*l*. Mason delivered the note to the plaintiff for 100*l*. in value received," who brought the action as bearer, and declared upon the "custom of merchants and others trading within this realm." Upon *non assumpsit* pleaded, and verdict for the plaintiff, "it was moved in arrest of judgment, that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable. *Quod fuit concessum per curiam;* for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order; in the latter case, the indorsee has been allowed to bring the action in his own name." The principal point of this case, viz., that the bearer could not maintain an action in his own name, was expressly declared not to be law in the case of *Grant* v. *Vaughan*, 3 Burr. 1516.

In the same year, in the case of *Boulton* v. *Hillesden*, Comb. 450, it was decided, that a master may be bound by a promissory note made by his servant. Another case, in the same year, is cited in 1 Com. Dig. 190, 191, by the name of *Cromwell* v. *Floyd*, in C. B., which does not seem to have been reported, unless it be the same case with that reported in 2 Lutw. 1582, by the name of *Bromwich* v. *Lloyd;* which is not impossible.

In Mich. term of the same year, in the case of *Woolvil* v. *Young et al.*, 5 Mod. 367, it was held, that a declaration upon a promissory note, founded on the custom of England, was bad, because it did not allege that the defendants were *commercium habentes;* but it seems to admit, that it would have been good, if those words had been used.

In an anonymous case, in chancery, in the same year, reported by Ch. Baron *400] Comyns, p. 43, it is said, that the "indorsee for a valuable *consideration, recovered in *indebitatus assumpsit* on this bill of exchange against the drawer. The drawer filed a bill in chancery to be relieved against this judgment at law, alleging that he received no value; and that the indorsee might resort to the indorser for his original claim. It was answered, that the drawer might be relieved against the payee, or any claiming as servant or factor of, or to the use of the payee: but the chancellor held, that the indorsee being an honest creditor, and coming by this bill fairly, for the satisfaction of a just debt, he would not relieve against him, because it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security." It may be doubted, whether this was really a bill of exchange or a promissory note; and perhaps, it is immaterial which it was, as the law had been clearly settled to be the same upon both. Yet, if it had been a bill of exchange, it seems probable, that something would have been said of the drawee; by which it should appear, that the plaintiff had a right of action against the drawer; such as that the bill had been presented for acceptance and refused; or that being accepted by the drawee, he had refused to pay, &c.

The case of *The Bank of England* v. *Newman*, 12 Mod. 241; B. R., 1 Ld. Raym. 442, and Comyns 57, was upon a promissory note, drawn by one Bellamy, payable to Newman, or bearer, who discounted is at the bank, without indorsing it. Upon Bellamy's failure, the bank brought suit against Newman. But the court held him not to be liable, "for the law is, that if a bill or note be payable to one, or bearer, and he negotiates the bill, and delivers it for ready money paid to him, without any indorsement on the bill, this is a plain buying of the bill; as of tallies, bank-bills, &c., but if it be indorsed, there is a remedy against the indorser."

Hawkins v. *Cardy*, in the next year (Mich., 10 Wm. III., B. R.), 1 Ld. Raym. 360; 1 Salk. 65; Carth. 466, was also upon a promissory note. "The plaintiff brought an action on the case, upon a bill of exchange" (says the reporter), "against the defendant, and declared upon the custom of merchants, which he showed to be thus: that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man, or his order, and afterwards, the person to whom the bill was made payable, indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shows that the defendant being a merchant, subscribed a bill of *46*l.* 19*s.* payable to Blackman, or order; that Blackman indorsed 43*l.* 4*s.* of it, payable to the plaintiff," &c. On demurrer, [*401 the declaration was adjudged ill; "for a man cannot apportion such personal contract; for he cannot make a man liable to two actions, where by the contract he is liable but to one." "But if the plaintiff had acknowledged the receipt of the 3*l.* 15*s.* the declaration had been good." And Holt, Chief Justice, said, "that this is not a particular local custom, but the common custom of merchants, of which the law takes notice." Salkeld, in reporting this case, begins thus: "A. having a bill of exchange upon B., indorses part of it to I. S., who brings an action for his part," &c. This, compared with Lord Raymond's report of the case, shows what has been already so often mentioned, that no difference had yet been discovered between the law respecting promissory notes, and that concerning inland bills of exchange. Even Lord Raymond states it first to be a bill of exchange, and immediately shows it to have been a promissory note. So glaring a contradiction could not have passed uncorrected, if a promissory note and an inland bill of exchange had not been considered as the same thing. In this case, it will be remarked, that upon demurrer, the court said, that this declaration, upon the custom of merchants, on a promissory note, by the indorsee against the maker, would have been good, if the receipt of the 3*l.* 15*s.* had been acknowledged.

The next year produced the case of *Lambert* v. *Oakes* (Pasch., 11 Wm. III., B. R.), reported in 1 Ld. Raym. 443; 1 Salk. 127, by the name of *Lambert* v. *Pack; Anon.*, 1 Salk. 126, case 6; 12 Mod. 244, and Holt 118. This case was clearly upon a promissory note, although four out of the five reports of the case call it a bill of exchange. This circumstance shows that no difference was understood to exist at that time between a promissory note and an inland bill of exchange; for upon this supposition only, can we account for the extreme inaccuracy of so many reporters upon that point. The fact of its being called a bill of exchange, induces also a strong presumption of another fact, which does not expressly appear in Lord Raymond's report of the case, and that is, that the plaintiff grounded his action on the custom of merchants; which was, at that time, the only known and established form of declaring upon a promissory note. This was, then, an action by the indorsee against the indorser of a promissory note, payable [*402 *to defendant or order, grounded on the custom of merchants, in which it was decided, that the plaintiff must demand the money of the drawer of the note, before he could resort to the indorser; and is another strong case to show that promissory notes and inland bills of exchange, before the statute of Anne, were precisely on the same footing.

The case of *Starke* v. *Cheeseman*, in the same year, Carth. 509, was upon a bill of exchange, drawn by the defendant in Virginia, upon himself in London, which, as has been before observed, is in effect a promissory note. The plaintiff had judgment, although he had not alleged in the declaration, that the defendant promised to pay the money after protest, or even that he had notice of the protest, for "the law did raise the promise, upon the custom of merchants, and therefore, it was not necessary to lay an actual promise."

In the next year (Pasch., 12 Wm. III., Anno 1700, B. R.), we find the case of *Carter* v. *Palmer*, reported in 12 Mod. 380. "Palmer had given a note under his hand in this form: "I promise to pay the bearer so much money on demand." Plaintiff brings his action, grounding it upon the custom of merchants, as if it were a bill of exchange; and avers no consideration. After verdict, upon motion in arrest of judgment, Holt,

Chief Justice, "We will take such a note *primâ facie* for evidence of money lent; and though they have declared on the custom, yet we must take care that, by such a drift, the law of England be not changed, by making all notes bills of exchange." "But all seemed to agree, if it were made payable to him or order, the defendant, by that form, had made it negotiable, and by consequence, he would be liable to the action of assignee in his own name; for if a man, who is no merchant, will draw a bill of exchange, he is suable upon it, according to the custom of merchants, for he makes himself a merchant *pro tanto*. And inland bills were not known until trade grew to a great height; and when they obtained, they received the same law with outlandish bills; and he said, he remembered, that at a trial upon an inland bill, before HALE, the defendant's counsel would put the plaintiff to prove the custom; but Hale said they had a hopeful point of it. *Et adjorn.*" It does not appear that this case was finally decided, but the principal point, viz., that a bill or note payable to bearer was not a bill of exchange, had been before decided in the cases of *Horton* v. *Coggs*, *Hodges* v. *Steward*, and *Nicholson* v. *Sedgwick* (before cited). But *these cases, as before observed, were expressly denied to have been law, by Lord MANSFIELD and the other judges, in the case of *Grant* v. *Vaughan*, 3 Burr. 1516.

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The other point of the case, viz., that if the note had been made payable to him, or order, the defendant, by that form, had made it negotiable, and the assignee might have sued in his own name, is in strict analogy with the whole current of authorities, from the time of the first introduction of promissory notes: and the reason given is the same with that used in the case of *Grant* v. *Vaughan*, viz., that the defendant, by the original contract, had made it negotiable, and had made himself expressly liable to the action of the assignee. The further reason given by the court shows most clearly, that a promissory note, payable to order, was an inland bill of exchange; "for, say the court, if a man, who is no merchant, will draw a bill of exchange, he is suable upon it, according to the custom of merchants, for he makes himself a merchant *pro tanto*."

There was another similar case at the same term, between *Jordan* and *Barloe*, 3 Salk. 67, where it is said to be "ruled, that where a bill is drawn, payable to W. R. or order, 'tis within the custom of merchants; and such a bill may be negotiated and assigned by custom, and the contract of the parties; and an action may be grounded on it, though 'tis no specialty; but if 'tis made payable to W. R., or bearer, 'tis not within the custom of merchants: and therefore, when, upon such a bill, the plaintiff declared that the defendant being a merchant, had drawn a bill according to the custom of merchants, but had not paid the money, this declaration was held ill."

Although the instrument in this case is not expressly stated to be a promissory note, yet it seems strongly implied, from the expressions used. For it may be remarked, 1st. That it appears by all the reports of the time, that the words bill and note were synonymous; that the term promissory note was not in use, and that, generally, whenever the term bill is used alone, it meant a promissory note. 2d. It is said, that "a bill payable to W. R., or order, was within the custom of merchants." It was surely not necessary, at that time, to have decided solemnly that a bill of exchange was within the custom of merchants. 3d. It is said, that "such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be *grounded on it, though 'tis no specialty;" which last expression seems more applicable to a promissory note than to a regular bill of exchange. 4th. It is said, that "the defendant drew a bill, but had not paid the money;" without naming any drawee, or a non-acceptance or non-payment by the drawee, or any other circumstance to show that the drawer was liable to pay the money. 5th. The points decided are precisely those mentioned in the preceding case of *Carter* v. *Palmer*.

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In the case of *Crawley* v. *Crowther*, 2 Freem. 257 (Trin., 1702), in chancery, it was said, that "it is now likewise held, and the practice is so, that if a man gives a note for money payably on demand, he need not prove any consideration."

Lawson v. *Lamb* (Hil., 12 Wm. III., C. B., Anno 1700), 1 Lutw. 274, was another case upon a promissory note by assignee of payee, a bankrupt, against the maker of the note. The pleadings are set forth at large, and it appears that the plaintiff declared

upon the custom of merchants, within the realm of England, upon a note payable to the bankrupt or order. "The objection to the declaration was, that all the proceedings of the commissioners of bankrupt ought to be alleged at large; but by reason of divers precedents, according to the declaration here, judgment *per tot. cur.* was given for the plaintiff."

In Trin. term of the same year, it is said by Comyns, in his Digest, p. 191, of vol. 1, that in the case of *Butcher* v. *Swift*, in B. R., it was doubted, whether a promissory note to A., or order, was within the custom of merchants, and whether the assignee could bring an action upon it in his own name. This case, it is believed, has not been reported.

In 1 Salk. 283, *Ford* v. *Hopkins* (Hil., 12 Wm. III.), Lord Holt is reported to have said at *nisi prius*, "that goldsmith's notes to pay money, or tickets, are evidence of the receipt of money." As he had before said, that every indorsement makes a new bill, it seems to follow, that an indorsement is also evidence of the receipt of money.

We have now examined all the reported cases upon promissory notes, from the time of the first introduction of inland bills, to the time of Lord Holt's decision in the case of *Clerke* v. *Martin*. At least, if any *others are to be found, they have escaped a diligent search. They form a series of decisions for a period of more than [*405 thirty years, in which we discover an uncommon degree of unanimity as well as of uniformity. We find the law clearly established to be the same upon promissory notes as upon inland bills; and we find no evidence that the latter were in use before the former. There is not a contradictory case, or even *dictum*, unless we consider as such the doubt expressed in the case of *Butcher* v. *Swift*, cited by Comyns; but that case is not reported, and therefore, it is impossible to say, upon what ground the doubt was suggested. The cases upon promissory notes and inland bills go to establish not only their likeness in every respect, but even their identity; for the former are almost uniformly called inland bills.

V. Upon examining the printed books of precedents, during the above period, we shall find that the common usage was, to declare upon a promissory note, as upon an inland bill of exchange.

The first precedent of a declaration upon a promissory note is that in Brownlow, Latine Redivivum, p. 74, which is prior to any of the declarations upon inland bills of exchange. It is, in substance, as follows, that there is, and was, from time immemorial, a custom among merchants at the city of Exeter, and merchants at Crozict, that if any merchant at Crczict should make any bill of exchange, and by the said bill should acknowledge himself to be indebted to another merchant, in any sum of money, to be paid to such other merchant, or his order, and such merchant to whom the same should be payable, should order such sum to be paid to another merchant, and such merchant to whom the same was payable, should request the merchant who acknowledged himself so as aforesaid to be indebted, to pay such sum to such other merchant to whom he had ordered the money to be paid; and if, upon such request, the merchant who acknowledged himself to be indebted in the sum in such bill and indorsement mentioned, should accept thereof, then he would become chargeable to pay the said sum to the person to whom it was by the said bill and indorsement directed to be paid, at the time in the said bill mentioned, according to the tenor thereof. It then avers, that on the 8th May 1678, the defendant, according to the custom aforesaid, acknowledged himself to be indebted to one M. M. in 52*s*., which he obliged himself and his assigns (this is probably misprinted) to pay to the said M. M., who, by indorsement on the same bill of exchange, on ——, at ——, ordered the money to be paid to the plaintiff, which bill of exchange afterwards, to wit, on ——, at ——, the defendant saw and accepted, by which acceptance, and by the usage aforesaid, the *defendant became liable, &c., and in [*406 consideration thereof, promised to pay, &c. There is, in the same book, p. 77, a declaration upon a bill of exchange at double usance, which is probably upon an inland bill, as the custom is alleged, generally, among merchants, but does not say at what place.

The next declaration on a promissory note is in the case of *Horton* v. *Coggs*, 3 Lev.

296. The note is dated 1st October, 4 Jac. II. The custom is alleged to be in London, that if any merchant or goldsmith, in London, should make a bill or note in writing, with his name subscribed, and thereby promise to pay to any person or bearer, &c.

In Clift's Entries 918, is a declaration upon an inland bill of exchange, calling it a note, and the word bill is not mentioned in the whole count. This shows that the words bill and note were considered as synonymous. In the same book, p. 899, *Turner* v. *Toft*, is a declaration by the indorsee *vs.* the maker of a promissory note, dated 6th November 1684. It states that within this realm of England, viz., at the city of Bristol, there is, and from time immemorial has been, a custom among merchants, &c., used and approved, viz., that if any merchant or other person using commerce, &c., make any note, under his proper hand, and thereby promise to pay to any other merchant, &c., in the same note mentioned, or to his order, any sum of money, at any time in such note specified; and such merchant, &c., to whom or to whose order the same is payable, &c., by indorsement of the said note, appoint such sum of money in the note mentioned to be paid to any other merchant, &c., in the said indorsement mentioned, or to his order, then such person who subscribed such note, having notice of such indorsement, is chargeable, and for the whole time aforesaid, hath been accustomed to be chargeable, to pay the sum of money in such note mentioned, to the person in such indorsement mentioned, at the time in such note limited for the payment thereof, according to the tenor of such note. It then sets forth the facts to bring the case within the custom, by reason of which, and of the custom aforesaid, the defendant became liable, &c., and so being liable, in consideration thereof promised to pay, &c.

The next precedent is in the case of *Sheppard and Bragg* v. *Flemyng* (Mich., 5 W. & M.), Clift. Ent. 929; indorsees *v.* maker. "Whereas, the said Flemyng, on 28th October 1692, at, &c., according to the custom of merchants in that case used and approved, made his certain bill in writing, and the same bill, with his proper hand subscribed, and by the said bill, promised to pay to one George Mason or order, the *sum of 40*l.*, upon the 28th day of November then next following, for value received; and whereas, the said George Mason, afterwards, viz., on ——, at ——, by indorsement with his proper hand subscribed upon the said bill, according to the usage and custom of merchants aforesaid in that case used and approved, appointed the contents of the said bill to be paid to the said William Sheppard and Joseph Bragg, by the name of William Sheppard and Company, in the said indorsement named, whereof the said Flemyng then and there had notice, by reason of which premises, and by the custom of merchants in that behalf used and approved, he was liable, &c., and being so liable, in consideration of the premises, promised to pay," &c.

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In Clift. Ent. 916, in the case of *Gibbs's Adm'x* v. *Fowle and Wooton*, is a declaration upon the custom of merchants, by administratrix of the payee against the maker, upon a promissory note made by his servant, dated 29th May 1693. See also 1 Wentworth's System of Pleading, 346. In p. 914, in the case of *Dymes* v. *Smith* (Mich., 8 Wm. III.), is a declaration on the custom, by the payee against the maker, upon a like note made by the servant, 7th May 1696. And in p. 913, in the case of *Wiseman* v. *Conyers*, is another, upon the custom, by the indorsee against the maker of a promissory note, dated 4th May 1686.

In 2 Mod. Intr. 126, is another declaration upon the custom, by the indorsee against the maker of three promissory notes, dated in 1697. This declaration is precisely like a modern declaration upon a promissory note, excepting that the note is called a bill, and is said to be made and indorsed "according to the custom of merchants," "whereby, according to the custom of merchants," the defendant became liable, and so being liable, &c. In p. 122, is another by payee *v.* the maker of a promissory note, calling it a "bill or note," and setting forth the custom specially. In every case upon a promissory note, the declaration is grounded on the custom of merchants.

Upon a review of this list of authorities and precedents, we are at a loss to imagine from what motive, and upon what grounds, Lord Holt could at once undertake to overrule all these cases, and totally change the law as to promissory notes: and why he

should admit inland bills of exchange to be within the custom of merchants, and deny that privilege to promissory notes; when the same evidence *which proved the former to be within the custom, equally proved that it extended to the latter. [*408 By examining the books, it will be found, that most of the points which have been decided respecting inland bills of exchange, have been decided upon cases on promissory notes. If he considered promissory notes as a new invention, when compared with inland bills of exchange, he seems to have mistaken the fact; for the probability is, that the former are the most ancient, or, to say the least, are of equal antiquity.

VI. But let us proceed to examine the case of *Clerke* v. *Martin* (Pasch., 1 Anne, B. R., 2 Ld. Raym. 757; 1 Salk. 129), upon which alone is founded the assertion in modern books "that before the statute of Anne, promissory notes were not assignable or indorsable over, within the custom of merchants, so as to enable the indorsee to bring an action in his own name against the maker." The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon the case, against the defendant, upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another was upon the custom of merchants, as upon a bill of exchange; and showed that the defendant gave a note subscribed by himself, by which he promised to pay ———— to the plaintiff, or his order, &c. Upon *non assumpsit*, a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange, within the custom of merchants, and therefore, the plaintiff, having declared upon it as such, was wrong; but that the proper way, in such cases, is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it.

"But it was argued by Sir Bartholomew Shower, the last Michaelmas term, for the plaintiff, that this note being payable to the plaintiff or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S., or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought his action upon it, as upon a bill of exchange, and might have declared upon the custom of merchants. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself, since the defendant, by his subscription, has shown his intent to be liable to the payment of this *money to the plaintiff or his order; and since he hath thereby [*409 agreed that it shall be assignable over, which is, by consequence, that it shall be a bill of exchange. That there is no difference in reason, between a note which saith, 'I promise to pay to I. S., or order,' &c., and a note which saith, 'I pray you to pay to I. S., or order,' &c., they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant (2 Vent. 292, *Sarsfield* v. *Witherly*), and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants."

"But Holt, Chief Justice, was *totis viribus* against the action; and said that this could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to a new sort of specialty, unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes, upon the custom of merchants, proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield* v. *Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing a writ of error.

"Gould, Justice, said, that he did not remember it had ever been adjudged, that a

note in which the subscriber promised to pay, &c., to I. S., or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between *Horton* and *Coggs*, now printed in 3 Lev. 299, but that it was never resolved, that the party himself (to whom such note was payable) could not have an action upon the custom of merchants, upon such a bill. But HOLT, Chief Justice, answered, that it was held in the said case of *Horton* v. *Coggs*, that such a note was not a bill of exchange, within the custom of merchants. And afterwards, in this Easter term, it was moved again, and the court continued to be of opinion against the action. And then Mr. Branthwaite, for the plaintiff, urged, that if this note was not a bill of exchange within the custom of merchants, then the promise founded upon it was void; and then it could not be intended that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general *indebitatus assumpsit.* HOLT, Chief Justice, said, that would be true, if it had been void by reason of its being insensible; but this matter is
*410] sensible enough, though not sufficient in law to raise a promise; *and therefore, one cannot intend but that damages were given for it; and consequently, that judgment must be arrested. And judgment was given *quod querens nil capiat per billam*, &c., by the opinion of the whole court."

As four other cases are reported upon this subject, prior to the statute of Anne, all of which were dependent upon this of *Clerke* v. *Martin*, it may be proper to notice what fell from the court in each, before any comments are made on that case.

At the same term, the case of *Potter* v. *Pearson* (1 Ld Raym. 759) was upon a writ of error from C. B., in which the court said, "It is a void custom, since it binds a man to pay money, without any consideration; for the rule is, *ex nudo pacto non oritur actio.* And therefore, the judgment was reversed." In the case of *Burton* v. *Souter*, at the next term (2 Ld. Raym. 774), it was moved in arrest of judgment, "that such a note is not within the custom of merchants, but they ought to declare upon a *mutuatus*, and give the note in evidence, as it was settled last term between *Clerke* and *Martin.* And of that opinion was the whole court." The case of *Williams* v. *Cutting*, at the next term (2 Ld. Raym. 825; Farr. 154), was another writ of error from the C. B. There were two counts: 1. On the custom of merchants, declaring upon a note given by the defendant to the plaintiff, promising to pay him so much money; 2. Upon an *indebitatus assumpsit.* There were several damages, but only one judgment; and it was assigned for error, that the count upon the custom of merchants was void; and therefore, there being one entire judgment, all was void, and judgment ought to be reversed in toto. And the case of *Clerke* v. *Martin* was quoted as an authority in point. The court were all of opinion, that, "if one of the declarations was such on which no damages ought to be recovered, it would be bad." And, *per* HOLT, as to that point, he had "proposed it to all the judges, and that they were all of opinion, that a declaration upon the custom of merchants upon a note subscribed by the defendant to the plaintiff, for so much money, or promising so much money, was void; for it tended to make a note amount to a specialty. And judgment, thereupon, was reversed in toto."
*411] Lord Raymond does not mention this last observation of Lord HOLT, but says, "Note; all the judges held clearly that the first count was ill *(according to the case of *Clerke* v. *Martin*), except POWELL, Justice, who doubted.

The next and last case in the books, before the statute of Anne, is that of *Buller* v. *Crips* (Mich., 2 Anne, Anno 1703), 6 Mod. 29. "A note was in this form; 'I promise to pay to I. S., or order, the sum of 100*l.*, on account of wine had of him.' I. S. indorses this note to another; the indorsee brings the action against him that drew the note, and declares upon the custom of merchants, as upon a bill of exchange; and a motion was in arrest of judgment, upon the authority of Clerke and Martin's Case. But Brotherick would distinguish this case from that; for there the party to whom the note was originally made, brought the action, but here it is by indorsee; and he that gave this note, did, by the tenor thereof, make it assignable or negotiable by the words 'or order,' which amounts to a promise or undertaking to pay to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

Chief Justice HOLT.—I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would have put them to prove the custom; at which HALE, who tried it, laughed, and said, 'They had a hopeful case on't.' And in my Lord NORTH's time, it was said, that the custom in that case was part of the common law of England, and the actions since became frequent as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public-notary, before the drawer may be charged; but inland bills need no protest. And the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them. And sure, to allow such note to carry any lien with it, were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty, and besides, to empower one to assign that to another, which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of a bill of exchange; for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise, it hinders the exportation of money out of the realm.

"He said, if indorsee had brought this action against indorser, it might peradventure lie, for the indorsement may be said to be tantamount to drawing a new bill for so much money as the note is for, upon the *person that gave the note; or he may sue the first drawer, in the name of the indorser, and convert the money, when [*412
recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use. And besides, it is a good authority to the original drawer, to pay the money to indorsee. And POWELL, Justice, cited one case where a plaintiff had judgment upon a declaration of this kind, in the common pleas; and that my Lord TREBY was very earnest for it, as a mighty convenience for trade; but that when they had considered well the reasons why it was doubted here, they began to doubt too; and the whole court seemed clear for staying the judgment. And at another day, the chief justice declared, that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that was pretended would ensue by obstructing this course; and that they had told him, it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree, a bill of exchange may be made between two persons without a third; and if there be such a necessity of dealing that way, why do not dealers use that way which is legal? and may be this; as if A. has money to lodge in B.'s hands, and would have a negotiable note for it, it's only saying thus: 'Mr. B. pay me, or order, so much money, value to yourself;' and signing this, and B. accepting it; or he may take the common note, and say thus: 'for value to yourself, pay indorsee so much; and good.' And the court at last took the vacation to consider of it;" but what became of the case afterwards does not appear.

These five cases, viz., *Clerke* v. *Martin*, *Potter* v. *Pearson*, *Burton* v. *Souter*, *Cutting* v. *Williams*, and *Buller* v. *Crips*, are the only reported cases in which the former decisions were overruled, and it may be observed, that the four last were decided upon the authority of the first, which is to be considered as the leading case; and it is, in that case, therefore, that we are to look for the grounds upon which so great a change of the established law was founded. We shall, however, consider the reasons that are scattered among the whole, as having concurred in the formation of Lord HOLT's opinion. In the first place, we find an assertion of his lordship, in *Clerke* v. *Martin*, "that this note could not be a bill of exchange," but he seems to have been too much irritated, at that time, to give a reason for the assertion, or to recollect that in the case of *Hill* v. *Lewis*, upon promissory notes, he had said, "that goldsmiths' bills were governed by the same laws and customs as *other bills of exchange," and that the verdict in that case would be good, "if found upon the bills of exchange." His [*413

next assertion is, "that the maintaining these actions upon such notes, were innovations upon the rules of the common law." But if, as we have shown, the custom of merchants is a part of the common law; if promissory notes had always, from the time of their first introduction, been adjudged to be as much within the custom of merchants as inland bills of exchange, then an action on a promissory note, founded on the custom, was not more an innovation than a like action upon an inland bill of exchange. Besides, that could hardly deserve the name of innovation, which had been sanctioned by all the judges of England, on a demurrer, as was the case in *Williams* v. *Williams*.

His next assertion is, "that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street." To this, it may be answered, that it did not amount to the setting up a specialty, because the consideration of a specialty is not examinable at law; but between immediate parties to a bill of exchange, or a promissory note, the defendant might always have availed himself of the want of consideration. It only amounted, at most, to the setting up a promissory note as a bill of exchange. The assertion that promissory notes were invented in Lombard street, is certainly not correct, for Malynes mentions them as in use in foreign countries, and as being assignable by the custom of merchants, long before they appear to have been introduced into England. The other assertions of his lordship only tend to show a degree of irritation which derogates from the respect which the decision might otherwise deserve. The mildness of Mr. Justice Gould forms a contrast with the precipitation of the chief justice. He said, "he did not remember that it had ever been adjudged, that a note, in which the subscriber promised to pay, &c., to I. S., or bearer, was not a bill of exchange; and that it was never resolved, that the party himself, to whom such note was payable, could not have an action upon the custom of merchants, upon such a bill."

In the case of *Potter* v. *Pearson*, it was said, that "it is a void custom, since it binds a man to pay money, without consideration." This reason equally applies to inland bills, and is no reason why a distinction should be taken between them and promissory notes payable to order. The one is as much a mercantile transaction as the other; *and "a *nudum pactum* does not exist in the usage and law of merchants," nor is "the want of consideration an objection in commercial cases." (3 Burr. 1669; 1 Powell on Cont. 341.) The case of *Burton* v. *Souter* furnishes no new reason, but relies entirely upon the case of *Clerke* v. *Martin*.

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The case of *Williams* v. *Cutting*, as reported by Ld. Raym. 825, shows only that Mr. Justice Powell doubted upon the case of *Clerke* v. *Martin*. But in Farr. 155, it appears, that Holt said, "he had proposed it to all the judges, and that they were all of opinion, that a declaration upon the custom of merchants, upon a note, was void; for it tended to make a note amount to a specialty." It has been before shown, that this reason was not founded in fact; and it may be further remarked, that if true in point of fact, yet it would equally apply to inland bills, and therefore, is no ground for a discrimination. But it appears by Lord Raymond, that all the judges did not agree, for Powell doubted.

The case of *Buller* v. *Crips* differed from the others in this, that the action was brought by the first indorsee, and not by the payee of the note. Lord Holt again declares that "the notes in question are only an invention of the goldsmiths in Lombard street," in which he was certainly mistaken. He repeats, that "to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty;" and the reason which he gives why this case ought not to be distinguished from that of *Clerke* v. *Martin*, is, that a man cannot assign that which he has not himself. But it is not as assignee that the indorsee was entitled to his action, but as the payee of a bill of exchange; for an indorsed note is a bill drawn by the payee of the note, upon the maker, in favor of the indorsee; and the maker accepts the bill when he signs the note, for it is no objection to the acceptance of a bill, that the acceptance is made before the bill. However, if the judgment in *Clerke* v. *Martin* was against law, the foundation of Lord Holt's opinion in this case must fail. His lordship again asserts, that "these notes are not in the nature of a bill of ex-

change;" and he now condescends to give his reasons why they are not; "for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise, it hinders exportation of money out of the realm;" in each of which reasons he is equally unfortunate, for the expedition of trade is not more promoted, nor is its safety more secured, by inland bills than by promissory notes, nor is the exportation of money more prevented by the former than by the latter. Indeed, it is, in modern times, *fully admitted, that payment by bills on a foreign country has no effect, either by increasing or diminishing the current coin of a nation. [*415 For payment of a sum by exchange prevents the importation of exactly the same sum of money.

But Lord HOLT himself admitted, that "if the indorsee had brought this action against the indorser, it might, peradventure, lie; for the indorsement may be said to be tantamount to the drawing a new bill, for so much as the note is for, upon the person that gave the note; or he may sue the first drawer, in the name of the indorser, and convert the money, when recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use; and besides, it is a good authority to the original drawer to pay the money to the indorsee."

If this indorsement makes it a bill of exchange for one purpose, the reason is not easily perceived, why it should not be a bill of exchange for other purposes. The express promise of the maker to pay the money to the indorsee, seems to be at least equal to an acceptance of the bill; and as it has been before observed, a bill may be accepted before it is in fact drawn. 3 Burr. 1663; Doug. 284; 1 Atk. 715 (611); Kyd. 48. A bill drawn by a man on himself "is payable by him at all events," and such a bill "is tantamount to an acceptance." 1 Went. System of Pleading, 225.

Lord HOLT admits also, that the indorsement will authorize the indorsee to sue in the name of the indorser; hence it appears, that the whole dispute was merely about the form of the action; and this renders it the more astonishing, that he should have contended, "*totis viribus*," as Lord Raymond says he did, for an exception so clearly contrary to the justice of the case, especially, as the point had been before so solemnly settled in the case of *Williams* v. *Williams*. Indeed, his lordship seems, by the latter part of the report of *Buller* v. *Crips*, to have relented a little, after his conversation with the merchants, for he agreed, "that a bill of exchange may be made between two persons, without a third," by saying thus, "Mr. B. pay me, or order, so much money, value to yourself; and signing this, and B. accepting it. Or, he may take the common note, and say thus: for value to yourself, pay indorsee so much; and good." This last example seems to have been precisely the case before the court; and as the court adjourned, without giving judgment, it seems *to be doubtful how they [*416 would have decided, notwithstanding what had been said before.

Hence, then, we find, from an examination of all the cases before the statute of Anne, that it never was adjudged, that a promissory note for money, payable to order, and indorsed, was not an inland bill of exchange. But we find, that the contrary principle had been recognised, in all the cases, from the time of the first introduction of inland bills and promissory notes, to the first year of Queen Anne, and that in one of them, it had been expressly adjudged, upon demurrer, in the king's bench, and the judgment affirmed, upon argument, in the exchequer chamber, before all the judges of the common pleas and barons of the exchequer, so that it may truly be said to have been solemnly adjudged by all the judges of England. Principles of law so established, are not to be shaken by the breath of a single judge, however great may be his learning, his talents or his virtues. That Lord HOLT possessed these in an eminent degree will never be denied; but he was not exempt from human infirmity. The report itself, in the case of *Clerke* v. *Martin*, shows that, from some cause or other, he was extremely irritated with the goldsmiths of Lombard street, and that his mind was not in a proper state for calm deliberation and sound judgment. The same observation applies to the case of *Buller* v. *Crips*, and is further confirmed, by that of *Ward* v. *Evans*, 2 Ld. Raym. 930, in which his lordship said, "But then I am of opinion, and always was

(notwithstanding the noise and cry, that it is the use of Lombard street, as if the contrary opinion would blow up Lombard street), that the acceptance of such a note is not actual payment.

This circumstance has also been noticed by judges and others, in some of the more modern reports. In the case of *Grant* v. *Vaughan*, 3 Burr. 1520, Sir Fletcher Norton and Mr. Dunning observe, that "Lord Holt was peevish," in the case of *Clerke* v. *Martin*, and Lord Mansfield remarked, that "Lord Holt got into a dispute with the city about it." In 1 W. Bl. 487, Lord Mansfield said, "The first struggle of the merchants (which made Holt so angry with them), to make inland bills in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted, they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the judges why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded." And in the case of *Brown* v. *Harraden*, 4 T. R. 151, Lord Kenyon said, it is not necessary now to consider whether or not Lord Holt were right in so pertinaciously adhering to his opinion, before the statute of Anne, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the *debt: *417] that question exercised the judgments of the ablest men at that time; but the authority which his opinion had in Westminster Hall, made others yield to him; and it was thought necessary to resort to the legislature to apply a remedy." And in the same case, p. 154, Buller, Justice, said, "The cases cited by the defendant's counsel are extremely material; for though they do not directly decide the question, they show that the courts of Westminster have thought the analogy between bills of exchange and promissory notes so strong, that the rules established with respect to the one ought also to prevail as to the other. Such is the general tendency of the cases since Lord Mansfield's time. Many of the cases alluded to by the plaintiff's counsel happened before the statute of Anne: they only show the strong disposition which Lord Holt manifested on all occasions to discourage promissory notes. It appears from them, that Lord Holt and the merchants were perpetually disputing whether or not they should be put upon the same footing with bills of exchange. The merchants did not contend that they might recover on notes in particular cases only, but that they should be universally considered in the same light as bills of exchange. Upon that ground, they applied to the legislature for relief, and their conduct is very strong, to show what construction the statute of Anne ought to receive."

Lord Kenyon said, "it has been argued, that there is an essential difference between bills of exchange and promissory notes; and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess, I see no difference whatever; they both make engagements of the same nature, and when the acceptor has accepted a bill, he is equally bound to be prepared to pay on the day appointed, as the maker of a promissory note." Lord Hardwicke, in the case of *Walmsley* v. *Child* (Anno 1749), 1 Ves. 346, says, "The reason of making the statute 3 & 4 Anne, arose from some determinations, in the beginning of her reign, by Holt, Chief Justice, that no action could be maintained on a promissory note, nor declaration thereupon, viz., *Clerke* v. *Martin*, and *Potter* v. *Pearson*, 1 Salk. 129, which cases produced the act, as the act itself recites; but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved, if lost." From this concurrent testimony, it is apparent, that the case of *Clerke* v. *Martin* was a hasty, intemperate decision of Lord Holt, which was acquiesced in by the other judges, in consequence of his overbearing authority, "which made others yield to him;" and that he so "pertinaciously" adhered to his opinion, as to render it necessary to apply to parliament to overrule him.

*418] *This, it is believed, is the true origin of the statute of Anne, which did not enact a new law, but simply confirmed the old; the authority of which had been shaken by the late decision of Lord Holt. This idea is confirmed by the words of the preamble of the statute, which are, "Whereas, it hath been held," that notes in writing, &c., payable to order, "were not assignable or indorsable over, within the custom of

merchants," and that the payee could "not maintain an action, by the custom of merchants," against the maker; and that the indorsee "could not, within the said custom of merchants, maintain an action upon such note" against the maker; "therefore, to the intent to encourage trade and commerce," &c., be it enacted, &c., that all notes in writing made and signed by any person, &c., whereby such person, &c., shall promise to pay to any other person, &c., or his order, or unto bearer, any sum of money, &c., "shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c., to whom the same is made payable;" "and also every such note, payable to any person," &c., "or his order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants," and that the payee may maintain an action for the same, in such manner as he might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, &c., who signed the same." And that the indorsee "may maintain his action," for such sum of money, either against the maker or any of the indorsers, "in like manner as in cases of inland bills of exchange." Here, it may be observed, that by using the words, "it hath been held," the legislature clearly allude to certain opinions, which they carefully avoid to recognise as law. And in the enacting clause, they say, that such notes "shall be taken and construed to be due and payable," &c., expressing thereby a command to certain persons, without saying expressly that the notes shall be due and payable, &c., for this being the law before, it was not necessary to enact the thing itself, but to instruct the judges how they should construe it. The mischief to be remedied was the opinion which had 'been held," not any defect in the law itself. By comparing this act with the cases decided prior to *Clerke* v. *Martin*, it will be found to contain no principles but such as had been fully recognised by the courts of law. It follows, therefore, that it was passed simply to restore the old order of things, which had been disturbed by Lord Holt.

The only real effect of the statute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reason of the custom of merchants, the new say, that he became liable by force of the statute. Even Lord Holt himself always admitted, that an *indebitatus assumpsit* for money had and received, or money lent, *would lie, and the note would be good evidence of it. [*419
His objections were only to the form of the action, and not to the liability of the parties.

A promissory note was always as much a mercantile instrument as an inland bill of exchange, and there certainly seems to be more evidence that the former is within the custom of merchants than the latter, and that it was so, at an earlier period, on the continent of Europe, from whence it was introduced into England; and when introduced, it came attended with all the obligations annexed, which the custom had attached to it.

We, sometimes, in modern books, meet with an assertion that a promissory note was not negotiable at common law; this may be true, because a promissory note was not known at common law, if from the term common law we exclude the idea of the custom of merchants. It was a mercantile instrument, introduced under the custom of merchants. But if the custom of merchants is considered, as it really is, a part of the common law, then the assertion that a promissory note was not negotiable at the common law, is not correct.

VIII. In the present case of *Dunlop* v. *Silver*, it is not necessary to inquire, whether a promissory note, while it is confined to the original parties, can be considered as a bill of exchange, within the custom of merchants, although the authorities already cited show it to have been so adjudged; but it is sufficient, if it become so by being indorsed. It has already been observed, that it has never been decided, that an indorsed promissory note is not a bill of exchange, or a negotiable instrument, under the custom of merchants, but that the contrary has been solemnly adjudged; and has been settled law for more than a century.

One of the counts in the present case is for money had and received; and the evidence produced is a promissory note made by Cavan, payable to the defendants, or order, by them indorsed to Downing & Dowell, and by them to the plaintiff. The

note was in due time protested, as an inland bill of exchange, for non-payment, and due notice given to the defendants. So that every step was taken which would have been necessary to charge the defendants as drawers or indorsers of an inland bill.

The indorsement of the defendants is evidence of money received by them from the intermediate indorsers, and the only question is, whether the money, so received, *420] is for the use of the plaintiff. The *solution of this question depends upon the nature of the contract which the defendants entered into by their indorsement. Lord Holt himself always admitted, that every indorsement was the drawing of a new bill; and even in the case of *Buller* v. *Crips*, he admits that the indorsement of a promissory note is the drawing of a bill on the maker in favor of the indorsee, and that the indorsee may maintain an action against the indorser upon the custom of merchants. This principle, which, so far from being denied, has always been recognised in the subsequent cases (Chitty 121; 4 T. R. 149), decides the nature of the engagement which the defendants entered into by their indorsement. It was that of the drawer of an inland bill of exchange, whose obligation as such is well ascertained by the custom of merchants. The plaintiff does not claim as assignee at common law, but as indorsee under the law-merchant; by which law, the defendants are clearly liable, as drawers of the bill, to pay the money to any indorsee, holder of the bill; and where the plaintiff has either an equitable or legal right to money received by the defendant, he may recover in an action for money had and received. The defendants, then, having received money (which they are clearly not entitled to hold, for it is admitted that the intermediate indorser would be entitled to recover it against them), and being, by the terms of their contract, as construed by the custom of merchants, liable to the plaintiff, are answerable in an action for money had and received. We have seen, that in the old declarations upon bills of exchange, the custom of merchants is not alleged, and yet the courts presumed that the advancer of the money was the factor of the plaintiff, through whom the plaintiff is supposed to pay the money to the defendant. In the case of *Woodward* v. *Row*, before cited, the court said expressly, that they would "intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant." Upon the same principle, the intermediate indorser is to be presumed to be the servant of the plaintiff, in the present case.

The indorser of a promissory note, or bill of exchange, when he receives the money from the indorsee, holds it in trust to be repaid to the holder of the bill or note, if he shall fail to obtain it from the acceptor or maker, after using due diligence, and giving proper notice. When this contingency has happened, the trust becomes absolute, and it is against conscience, if the indorser refuses to pay the money to him to whom of right it belongs.

The argument on the part of the defendants in this action is, that as a promissory note is not an instrument negotiable by the custom of merchants; as the statute of Anne is not in force in Virginia, and as *the act of assembly of Virginia does not *421] give an action against the indorser, his engagement is only such as arises at common law; which is only an implied contract to refund money which has been paid in contemplation of a consideration that has failed. That this contract exists only between the indorser and his immediate indorsee, and is such a chose in action as by the common law is not assignable. That it arises only in consequence of the money paid, and is raised in favor of that person only from whom the money was received. That the payment of the money by the plaintiff to the intermediate indorser raises no contract between the defendant and the plaintiff. That there is no privity between the plaintiff and defendant, whereby the plaintiff can derive any benefit from the contract made by the defendant with the intermediate indorser; and that no action of *indebitatus assumpsit* will lie, without such privity. That even supposing the contract of the defendant was express, to pay the money to the intermediate indorser, or to his order, yet that contract would not be negotiable or assignable, so as to enable the plaintiff to recover in his own name, because no consideration moved from him, and no promise is made to him; and if the promise were in fact made to him, yet it would be as to him *nudum pactum.*

This argument, so far as it is necessary to consider it, may be reduced to these five propositions: 1. That promissory notes are not negotiable, within the custom of merchants. 2. That the contract of the indorser is only an implied contract, grounded on the receipt of money upon a consideration that has failed. 3. That this contract is a chose in action not assignable. 4. That no action of *indebitatus assumpsit* will lie, without privity. 5. That a promise in writing, without consideration expressed, is *nudum pactum*.

The first proposition, viz., that promissory notes are not negotiable within the custom of merchants, has been fully considered, and seems not to be maintainable. It might, therefore, be deemed unnecessary to examine the argument further; but as some of the other points are questionable, it may be worth while to notice them.

The second proposition is, that the contract of the indorser is only an implied contract, grounded upon the receipt of money upon a consideration which has failed. If this were true, it would equally apply to the case where a man receives a note with a blank indorsement, and passes it away, for a valuable consideration, without indorsing it himself. But in such a case, no man has ever been held liable, unless there was an antecedent debt, or, from particular circumstances, a guarantee of the note could be presumed, or unless he knew the note to be a bad one at the time. (*Fenn* v. *Harrison*, 3 T. R. 759, 761.) This point was early decided in the case of *The Bank of England* v. *Newman*, in 1 Ld. Raym. 442. It is true, that this was a note payable to the defendant or bearer, but it has been held in the case of *Peacock* v. *Rhodes*, Doug. 636 (614), and *Ancher* v. *Bank of England*, Ibid. 639 (617), that a note with a blank indorsement is exactly like a note payable to bearer. The reason is, that the receiver of such a note takes it upon the credit of the parties named upon it, and gives no personal credit to the man who merely pays it away, without indorsement. The obligation of the indorser, then, does not arise from the receipt of money only, but in consequence of his having written his name upon the instrument. But the simple writing of his name upon the instrument can create no obligation, unless it be the sign of a certain contract. Words are but representatives of ideas, and evidence of the intention of the contracting parties. Any other mode of conveying those ideas, and testifying that intention, if equally certain, is equally capable of being the evidence of an express contract. The act of writing one's name upon the back of an instrument of a certain description, is as strong evidence of an express contract, as if it had been written in a thousand words. What the nature of that contract is, depends upon the nature of the instrument indorsed; but still it is not an implied, but an express contract. The terms of that contract are known by a reference to the usual mode of transacting buesness, the nature of the instrument, and the incidents which have been attached to it, either by positive law, by common acceptation, or by judicial authority. The purpose for which a man puts his name on the back of a promissory note is well known, and cannot be mistaken; it is to give credit to the note; but to answer that purpose, it must be the sign of a contract to pay the money to the holder, if the maker does not. Such is the common acceptation and understanding of the country. The signature of the defendants is as much evidence of such a contract, as it is of the receipt of the money, or of an order to pay the money to the indorsee. But it is said—

*3d. That such a contract, being made with the immediate indorsee, is not negotiable, because it is a chose in action, which by common law cannot be assigned. To this it may be answered, that the antiquated doctrine that a chose in action is not assignable, was introduced in early times, before negotiable instruments were in use, when trade was carried on in its simplest form, and when the principal, if not the only purpose intended to be answered by the rule, was to prevent maintenance in controversies respecting titles to land. It was to prevent the poor man from being oppressed by a powerful antagonist, to whom his competitor might assign his title, and who, by his wealth, his influence, or his power, might pervert justice. At what time, or by what means, it was first applied to personal rights, is not ascertained; but it seems clear, that in its original adoption, it was never intended to apply to those instruments which, by their nature and the original contract of the [*422

parties, were made negotiable. Every man has a natural right to make such contracts as he pleases, provided they are not repugnant to any positive law, nor injurious to others; and all contracts entered into without fraud or force, are legally and morally obligatory, according to their spirit and intent. The reason of the rule was to prevent maintenance. (Co. Litt. 214.) But no man could be oppressed by maintenance who had expressly agreed to pay his debt to such person as his creditor should appoint. The reason of the rule failing, the rule itself cannot apply. Blackstone (2 Com. 442) calls it the strict rule of the ancient common law; and the reason given is, "because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law." But it was a rule introduced for the benefit of the debtor, and every man may waive the benefit of a law introduced for his advantage. Blackstone says, "this nicety is now disregarded; though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust," &c.

Woodeson says (in vol. 2, p. 387), "It is a maxim of the common law, that no chose in action can be granted or assigned. The policy whereof was to avoid a multiplicity of suits, by preventing those who would not prosecute their right themselves, from transferring it to others of a more litigious disposition; and particularly, to prevent the granting of pretended titles to great men, 'whereby,' saith Sir Edward Coke (1 Inst. 214 *a;* 266 *a*), 'Justice might be trodden down.' Perhaps, the rule was more general, than the mischief apprehended; and having relation originally to landed es-
*423] tates, was afterwards unnecessarily transferred to personal property. The doctrine, *however, always was, that a chose in action was assignable in equity, for a valuable consideration. Bills of exchange and promissory notes are regularly assignable by indorsement; and if bonds, policies of insurance, and even judgments, are in like manner assigned for valuable consideration, the assignee may sue in the name of the original claimant, and the latter will not now be permitted, even in the courts of common law, to undo his own transfer, or unconscientiously to obstruct the plaintiff's suit. Where one of the captors of a maritime prize, before condemnation thereof, transferred his proportionate share of the property taken, it was held, that the assignee might maintain an action for the same, against the capturing ship's agent, as for money received by him to the plaintiff's use." (*Morrough* v. *Comyns*, 1 Wils. 211.) Upon which case, it may be observed, that the sailor's right to a share of the prize-money was as clearly a chose in action as a right to any other property not in possession; and the assignment of such right was as clearly within the old rule that a chose in action is not assignable; it is, therefore, a much stronger case than that of a debt which, by the original contract itself, the parties have made negotiable.

The cases on this subject are collected in a very able argument of Judge Buller, in the case of *Master* v. *Miller*, 4 T. R. 340, and although the judgment in that case was contrary to his opinion, yet it was not given upon the point mentioned in that part of his argument which we shall cite. Evans on Bills, 106, speaking of this argument, says, "it furnishes a greater share of professional instruction, and a more admirable specimen of judicial reasoning, than can often be found in an equal compass." "It is laid down," says the judge, "in our old books, that for avoiding maintenance, a chose in action cannot be assigned or granted over to another. Co. Litt. 214 *a;* 266 *a;* 2 Roll. 45, *l.* 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times, it has been so explained away, that it remains, at most, only an objection to the form of the action, in any case. In 2 Roll. Abr. 45, 46, it is admitted, that an obligation, or other deed, may be granted, so that the writing passes; but it is said, that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in that of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his

friendship or interest saved him an *expense which he would otherwise be put to, was held guilty of maintenance, Bro., tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 Roll. Abr. 115. But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a chose in action; and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity, from the earliest times thought the doctrine too absurd for them to adopt; and therefore, they always acted in direct contradiction to it. And we shall soon see, that courts of law also altered their language very much. In 12 Mod. 554, the court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act upon. So, an assignment of a chose in action has always been held a good consideration for a promise. It was so, in 1 Roll. Abr. 29; 1 Sid. 212; and T. Jones, 222; and lastly, by all the judges of England, in *Moulsdale* v. *Birchall*, 2 W. Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say, that the maxim was a bad one, and that it proceeded upon a foundation which fails.

"But still it must be admitted, that though the courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet, in many cases, they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow, when the substance is gone; and that it is merely a shadow, is apparent from the latter cases, in which the courts have taken care that it shall never work injustice. In *Bottomly* v. *Brooke* (C. B., Mich., 22 Geo. III.), 1 T. R. 621, which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.*, lent to the defendant by E. Chancellor; and was given by her direction, in trust for her, and E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the court. In *Rudge* v. *Birch* (K. B., Mich., 25 Geo. III.), 1 T. R. 622, on the same pleadings, there was judgment for the defendant. And in *Winch* v. *Keely* (K. B., Hil., 27 Geo. III.), 1 T. R. 619, where the obligee assigned over a bond, and afterwards became *bankrupt, the court held that he might, notwithstanding, maintain the action. [*425 Mr. J. Ashhurst said, 'It is true, that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then, if this court will take notice of a trust, why should they not of an equity. It is certainly true, that a chose in action cannot strictly be assigned, but this court will take notice of a trust, and see who is beneficially interested.' But admitting that on account of this quaint maxim, "there may still be some cases in which an action cannot be maintained by an assignee of a chose in action, in his own name; it remains to be considered, whether that objection ever did hold, or ever can hold, in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans* v. *Van Mierop*, Lord Mansfield said, if a man agreed to do what, if finally executed, would make him liable, as in a court of equity, so in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold, that is, in the cases of bills of exchange, and policies of insurance." (He might have added, the case of bills of lading.) 'The first is the present case; and bills are assignable by the custom of merchants.

So, in the case of policies of insurance, till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was, to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it. Circulation, and the transfer of property, are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned, and I will show you other cases in which the court have allowed it. 1st. In *Fenner* v. *Meares*, 2 Bl. Rep. 1269, where the defendant, the captain of an East-Indiaman, borrowed 1000*l.* of Cox, and gave two *respondentia* bonds, and signed an indorsement on the back of them, acknowledging that in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them, in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said, '*Respondentia* bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the *first obligee. This contract is, therefore, devised to operate upon subsequent assignments, and amounts to a declaration that, upon such assignment, the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money, in conscience; and therefore, I think, entitled also at law; for the defendant has promised to pay any person who is entitled to the money.' So, in the present case, I say, the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is bound by law to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is, in conscience, entitled to the money; and on that ground, it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here, in the beginning of the last term, on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of the plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2d *Clarke* v. *Adair* (sittings after Easter, 4 Geo. III.), Debray, an officer, drew a bill on the agent of a regiment, payable out of the first money which should become due to him on account of arrears, or non-effective money. Adair did not accept the bill, but marked it in his book; and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties, that this was not a bill, within the custom of merchants: but Lord Mansfield said, it is an assignment for valuable consideration, with notice to the agent, and he is bound to pay it. He said, he remembered a case in chancery, where an agent, under the like circumstances, had paid the money to the administrator, and was decreed, notwithstanding, to pay to the person in whose favor the bill was drawn. 3d. In *Israel* v. *Douglas* (C. B., East., 29 Geo. III.), 1 H. Bl. 242, A., being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due by A. to B., whereupon, C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held, that C. might maintain an action for money had and received against him. And Mr. J. Heath expressly said, he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the house of lords in *Gibson* v. *Minet*. Lastly, I come to the case of *Tatlock* v. *Harris* (3 T. R. 182), in which Lord Kenyon, in delivering the judgment of the court, said, 'it was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties *to appropriate so much property to be carried to the account of the holder of the bill, and this will satisfy the justice of the case, without infringing any rule of law.' All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received Let us not be less

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liberal than our predecessors, and we ourselves have been on former occasions. Let us recollect, as Lord Chief Justice WILMOT said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justitiam:* and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of *sulpœna*, if he can make that justice appear. The justice, equity and good conscience of the case of these plaintiffs can admit of no question: neither can it be doubted, but that the defendant has got the money which the plaintiffs ought to receive."

Thus we see, that the rule that a chose in action is not assignable, has been often shaken; that, at most, it amounts only to an objection to the form of action, and that courts of law ought to lean against an exception to form, which does not support the substantial merits of the case. No case is recollected, in which it has ever prevailed, when the instrument was made negotiable by the original contract and intention of the parties. This promissory note was intended by the parties to be negotiable; it is made payable to order, and says on the face of it, "negotiable at the bank of Alexandria." And in the cases of *More* v. *Manning*, Comyns 311; *Acheson* v. *Fountain*, 1 Str. 557; and *Edie* v. *E. India Company*, 2 Burr. 1216, it is determined, that a bill or note, negotiable in its original creation, remains negotiable in the hands of the indorsee, even if it be not indorsed payable to order. If the original contract of the maker was negotiable, the dependent contract of the indorser must be negotiable also, for he warrants that the maker shall perform his engagement; which is, to pay the money to the holder. The indorsement follows the nature of the original contract, and partakes of its negotiability.

That a chose in action may be made negotiable or assignable in its original creation, by the contract and intention of the parties, independent of the custom of merchants, and of statute law, seems not to be a new idea, but is strongly supported by the reasons assigned by the judges for their judgment in several of the reported cases. It was very early settled, that if A. deliver money to B., to be paid to C., C. might maintain an action against B. for the money. *Core* v. *Woddye*, *1 Dyer 21 *a*, pl. 128 [*428
(Trin., 28 Hen. VIII.); *Flewellin* v. *Rave*, 1 Bulst. 68 (Mich., 8 Jac. I.); *Beckingham and Lambert* v. *Vaughan*, 1 Roll. Abr. 7, pl. 2 (Trin., 1 Jac. I.); *Disborne* v. *Denaibo*, Ibid. 30–1 (Pasch., 1649); *Wherwood* v. *Shaw*, 1 Brownl. 82, and Yelv. 23 (44 Eliz.); *Babington* v. *Lambert*, Moore 854 (11 Jac. I.); *Bell* v. *Chapman*, Hardres 321 (14 & 15 Car. II.); *Brown* v. *London*, 1 Vent. 152 (23 Car. II.); *Hornsey* v. *Dimocke*, Ibid. 119 (23 Car. II.); *Cramlington* v. *Evans*, 2 Vent. 310 (1 Wm. & M.). In these cases, it will be found, that no consideration passed from C. to B., nor any promise from B. to C., and yet an action was held to be maintainable by C. against B., upon the contract made between A. and B. So that, to support an action for money had and received, it is not necessary that a consideration should pass from the plaintiff to the defendant, nor any promise from the defendant to the plaintiff; and this principle will be found to run through all the cases for money had and received.

In the case of *Oble* v. *Dittlesfield* (23 Car. II., B. R.), 1 Vent. 154, the principle is carried still further. The money in this case was not paid by A. to B., purposely to pay over to C., as in the former cases, but B. being indebted to A., and A. to C., A. appointed C. to receive the money from B. in satisfaction of the debt due to C. by A., which he (A.), signifying to B. (the defendant), he, in consideration of the premises, and that the plaintiff (C.) would forbear him a quarter of a year, promised that he would then pay him. It was moved in arrest of judgment, that there was no sufficient consideration; for the defendant was no party to this agreement, and was not liable to the plaintiff, and therefore, the plaintiff's forbearance was no benefit to the defendant; *sed non allocatur*, for HALE said, "When *assumpsits* first grew into practice, they used to set out the matter at large, viz., in such a case as this, *Quod muto agreatum fuit inter eos*, &c., and they should be discharged one against the other. But since, it hath been the way to declare more concisely. And upon the whole matter here, it appears, that the defendant agreed to the transferring of the debt to the plaintiff; and that it was agreed he should be discharged against A."

Here, then, is an assignment of a debt, and held to be valid, because the debtor agreed to it. This was a precedent debt, and was clearly a chose in action; and if such debt may be assigned by a subsequent agreement of the debtor, *à fortiori*, may a debt be assigned, which the debtor expressly makes assignable at the very moment of its creation. Its negotiability then becomes a part of the nature of the contract; it is a quality belonging to the debt itself, and enters into its very essence.

Another principle which seems to be well established is, that he for whose benefit a promise is made, may maintain an action upon it, although *no consideration pass from him to the defendant or any promise from the defendant directly to the plaintiff. This proposition is supported not only by the authorities already cited, but by the case of *Dutton* v. *Poole* (30 Car. II.), T. Jones 102; 1 Vent. 318, 332; 1 Freem. 471; T. Raym. 302; 2 Lev. 210; 3 Keb. 786, 814, 830, 836; Styles's Prac. Reg. 59; *Sadler* v. *Paine*, Saville 24; *Starkey* v. *Mill* (Mich., 1651), 1 Roll. Abr. 23, pl. 13, and Styles 296; *Hadres* v. *Levit*, Hetley 176; *Hawes* v. *Levitt*, Moore 550; *Rippon* v. *Norton*, Cro. Eliz. 652; s. c. Ibid. 849, 881; *Bourne* v. *Mason*, 1 Vent. 6, 7 (20 Car. II.); *Legat's Case*, Latch 206 (3 Car. I.); *Martyn* v. *Hind*, Cowp. 443; *Company of Feltmakers* v. *Davis*, 1 Bos. & Pul. 101 (38 Geo. III., C. B.). *429]

If A. lends B., $100, for which B. gives A. his promissory note, payable to A. or order, the money thus delivered by A. to B., is delivered to be paid over by B. to a third person, upon a contingency, viz., that A. shall, by indorsement on the note, name the person to whom it is to be paid. This differs in nothing from the case of *Core* v. *Woddye*, and the other cases before cited, except that the third person is not named at the time of the delivery of the money to B. But the case of *Oble* v. *Dittlesfield* shows, that the naming of a third person may be as well done after the debt is created, as at the time of its creation, provided the debtor agree to the transfer. These principles certainly go far to prove that a contract for the payment of money may be made negotiable in its nature, by the consent of parties, on principles of common law. It must be an obstinate principle of law, indeed, and justified by the strongest reasons, that can prevent free agents from voluntarily entering into a contract, not injurious to themselves or others. Every contract is to be construed according to the intention of the parties. A contract constitutes the law between the contracting parties, unless it be contrary to some positive law, or prejudicial to society.

No good reason can be given, why a man should not be permitted to make his contract negotiable. In the case of *Hodges* v. *Steward*, 1 Salk. 125 (3 W. & M.), it is said, "a difference was taken between a bill payable to I. S. or bearer, and I. S. or order; for a bill payable to I. S. or bearer, is not assignable by the contract, so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, *theft or otherwise. But when the bill is payable to I. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action." Here it is held, that the words "or order," make the contract negotiable. *431]

In *Hill* v. *Lewis*, 1 Salk. 132 (5 W. & M.), Lord Holt said, "for the words or order" (this was in a promissory note before the statute of Anne) "give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer, that he would answer it to the assignee." In *Jordan* v. *Barloe* (12 Wm. III.), 3 Salk. 67, it was "ruled, that where a bill" (probably meaning a promissory note) "is drawn payable to W. R., or order, 'tis within the custom of merchants, and such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be grounded on it, though 'tis no specialty." In *Carter* v. *Palmer*, 12 Mod. 380 (12 Wm. III.), upon a promissory note, payable to bearer, "all seemed to agree, if it were made payable to him or order, the defendant by that form had made it negotiable, and by consequence, he would be liable to the action of assignee in his own name."

In *Clerke* v. *Martin*, 1 Ld. Raym. 757 (1 Anne), Shower, for the plaintiff, argued in the same manner, using nearly Lord Holt's own expressions in the cases just cited; yet his lordship was "*totis viribus*" against him. Shower contended, "that this note,

being payable to the plaintiff, or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S. or bearer, which he admitted, was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange, to be negotiable: but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought an action upon it, as upon a bill of exchange. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself; since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff, or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange; and to make *such a note a bill of exchange can be no wrong to [*432
the defendant, because he, by signing the note, has made himself to that purpose a merchant, and has given his consent that his note shall be negotiated, and has thereby subjected himself to the law of merchants." Strong as this reasoning is, it was not sufficient to convince Lord Holt. A similar argument by Brotherick, produced no greater effect upon his lordship in the case of *Buller* v. *Crips*, 6 Mod. 29 (2 Anne), where it was said, that "he that gave this note did, by the tenor thereof, make it assignable or negotiable, by the words 'or order,' which amounts to a promise or undertaking, to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

But although his lordship would not acknowledge the weight of his own arguments, they have been duly appreciated by subsequent judges. In the case of *Edie et al.* v. *E. India Company* (Trin., 1 Geo. III.), 2 Burr. 1216, it was contended for the plaintiffs, "that a promissory note or bill of exchange, originally made payable to one, or order, is, in its own nature, assignable; and the assignee has the whole interest in it, and may assign it as he pleases; and any restriction or confinement of his assignment of it, is contrary to the nature of the thing, and therefore, void." And the counsel for the defendants admitted that such a bill of exchange "was negotiable in its nature." But they contended, that an indorsement to a man, without the words *or order*, was no more than a naked authority to receive the money.

Lord Mansfield said, "a draft drawn upon one person, directing him to pay money to another, or order, is, in its original creation, not an authority, but a bill of exchange, and is negotiable."

Mr. Justice Dennison.—"Where a bill is originally made payable to A., or order, it is of course, and in its very essence, negotiable, from hand to hand. An inland bill of exchange is assignable in its nature." "Foreign bills are equally so by the law of merchants." "This is matter of law: and the law is clearly and fully fixed. There is no instance of a restrictive limitation, where a bill is originally made payable to a man or order." "In general, the indorsement follows the nature of the thing indorsed; and is equally negotiable." "The law has determined that the bill is negotiable in itself."

Mr. Justice Wilmot.—"This original contract is 'to pay to such person or persons as the payee or his assignees, or their assignees shall direct,' and there is the same privity (see s. c. 1 W. Bl. 299), between the drawer and the last assignee, as the first." [*433
"The first *assigns over that chose in action which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages that it had when he received it." "The indorsement is part of the original contract and is incidental and appurtenant to it, in the nature of it, and must be understood and interpreted in the same manner as the bill was drawn. And the indorsee holds in the same manner, and with the same privileges, qualities and advantages as the original payee held it; that is, as an assignable, negotiable note, which he may indorse over to another, and that other to a third, and so on, at pleasure." "And there is no difference whether the determinations be on promissory notes or on bills of exchange: it is just the same thing; because it is to be governed by the same rule." "The convenience and course of trade is to be attended to: the intention is to be regarded, not the form."

The case of *Grant* v. *Vaughan*, 3 Burr. 1516, was by the bearer against the drawer of a check in this form, "Pay ship Fortune or bearer 70*l*." This check was delivered to one Bicknell, the ship's husband, who lost it. It came honestly to the hands of the plaintiff in the way of trade. The declaration was upon a bill of exchange, and for money had and received. On the part of the defendant, it was contended, "that this was not a negotiable note, but only an authority to receive so much cash. That it cannot be considered as a negotiable bill of exchange; for it was not accepted nor indorsed, nor was it protestable, nor entitled to any day of grace."

"The plaintiff's counsel insisted that this bill or note was in its nature negotiable; that such bills were, in fact, always considered as negotiable, and actually negotiated, and commonly circulated as cash. And if they be, from the nature of the contract, negotiable, the finding of the jury cannot alter the law." "They object that it is not a bill of exchange, because it is not accepted, nor can be protested, nor is entitled to a day of grace, nor is indorsable. But it is a negotiable instrument. It is not necessary that it should be a bill of exchange; an inland bill of exchange is not like a foreign bill of exchange; for the former could not have been protested, before this act of parliament, nor needs to be so, since the act; whereas, a foreign one always absolutely required it." "Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer; however, an implied promise would suffice for our purpose."

This reasoning is evidently grounded upon general principles of the construction of contracts; for the counsel then go on to reason from the statute of Anne. "But," say the counsel, "they were negotiable, *before the act was made." "And there is
*434] no case at all where it has been determined, that a note of this kind cannot be given in evidence, upon a general *indebitatus assumpsit* for money had and received. It is enough for the plaintiff, that this note was negotiable. The bearer must prevail against the drawer, in some mode of action." "But there can be no sort of doubt on the latter count" (money had and received), "as the note is evidence of the plaintiff's money being in the hands of the person who gave it. Whether, therefore, this case be considered upon principles of law, prior to the act of 3 & 4 Anne, or upon that act, or upon what has passed since the act, it will appear, that the plaintiff ought to recover upon this action."

Lord Mansfield went into a minute examination of the cases of *Nicholson* v. *Sedgwick*, *Horton* v. *Coggs*, and *Hodges* v. *Steward*, and said, that upon general principles, they were not agreeable to law. "It is a queston of law, whether a bill or note be negotiable or not. It appears in the books, that these notes are by law negotiable; and the plaintiff's maintaining his action, or not maintaining it, depends upon the question, whether such a note is negotiable or not." Speaking of the decisions of Lord Holt, before the statute of Anne, he says, "The objection was to bringing an action upon the note itself, as upon a specialty; but I do not find it anywhere disputed, that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one, or order." "But upon the second count, the present case is quite clear, beyond all dispute; for undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bonâ fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person who has the note as bearer."

Mr. Justice Wilmot.—"Probably, the jury took upon themselves to consider whether such bills or notes as this is, were in their own nature negotiable." But this is a point of law; and by law they are "negotiable." And again, he says, "But this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ;* and a person may take by that description, as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it (whether it be a note, or a bill of exchange), and it is repugnant to the contract, that the drawer should object
*435] that the bearer has no right to demand payment from him. *It is agreeable to common sense and reason, that if a man comes by such a note or bill fairly, and on a valuable consideration, he should have a right to maintain an action upon it as

bearer. The reasons given in the cases that are opposite to this (*Hinton's Case*, 2 Show. 235), are altogether unsatisfactory. Those determinations strike at this great branch of commerce; if they were to prevail, they would put an end to all this species of it. Even before the statute of 3 & 4 Anne, Lord Chief Justice HOLT himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note: and if it was a question antecedent to that act, I should stand by that first case of *Hinton*, rather than the latter ones which differ from it. But that statute was made expressly, and on purpose, to obviate these doubts. However, if you would suppose it made to introduce a new law, and that such an action could not be maintained before the making of it, yet," &c. "This now under consideration is a negotiable instrument, which I think partakes more of the nature of a promissory note than of a bill of exchange. But taking it as a bill of exchange. A bill of exchange is a promise to pay the money, if the drawee does not pay it."

Mr. Justice YATES said, "Nothing can be more peculiarly negotiable, than a draft or bill payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*. It had been doubted, it is true, whether that species of action where the plaintiff declares upon the note itself, as upon a specialty, was proper; but here is a count for money had and received to the plaintiff's use. The question whether he can bring this action, depends upon its being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and therefore, he was certainly entitled to bring this action, and if he transfers his property to another person, that other person may maintain the like action." "Giving such a bill is, as it were, an assignment of so much property, which becomes money had and received to the use of the holder of the bill." (See also *Tatlock* v. *Harris*, 3 T. R. 182.)

It will be observed, that the whole reasoning of this case is grounded, not on the custom of merchants, but upon the check being a negotiable *instrument, in its nature; and that it applies as strongly to a promissory note before the statute of [*436 Anne, as to a bill of exchange.

A practical exposition of these principles is to be found in the case of *Fenner* v. *Meares*, 2 W. Bl. 1269, which was an action for money had and received, brought by the assignee of a *respondentia* bond, against the obligor. The bond was payable to one Cox. The defendant, in the presence of Cox, signed an indorsement on the bond, by which he acknowledged himself "bound to pay to such assignee thereof as should be duly appointed by him the said James Cox, the whole of the principal and interest of the within bond, agreeably to the tenor thereof, without any deduction or abatement whatsoever." It was objected for the defendant, that no general *indebitatus assumpsit* will lie, where the debt arises on a specialty, and if it did, yet the plaintiff ought to have recovered no more than he paid to the assignor, with common legal interest. For the plaintiff, it was said, that the objection was only to the form of the action; and the court would not grant a new trial, contrary to equity. "But the form of the action is well conceived. The indorsement is an *assumpsit* by simple contract, as much as if made on a separate paper, after the assignment had. Meares promises to pay any one to whom Cox should assign; besides the reiterated promise made to Evans, after Meares's return." "As for the damages and interest, those must pursue the terms of the original contract, which is now transferred to Fenner."

BLACKSTONE, Justice.—"As this is entirely a new question, and I cannot, upon so short a consideration, foresee all the consequences attending it, I shall avoid giving any decisive opinion upon it. I cannot, for instance, upon so transient a view, discern what effect might be derived to the assets of a person deceased, by thus turning a specialty debt into a simple contract. And from this caution, rather than from any great doubt attending this particular case, I choose to determine it upon plainer and more indisputable grounds, arising from the evidence before us. The promise made by Meares to Evans" (a messenger sent by the plaintiff to the defendant, to give him notice of the assignment, and to demand the money), "upon his return from India, is clearly an *assumpsit* to Fenner. It would be a sufficient promise, to avoid the statute of limitations. And the assignment and other transactions are fully sufficient as a consideration, to

make that *assumpsit* binding. Upon that ground, it is, therefore, clear, that a general
*437] *indebitatus assumpsit* will lie. 2d. As to the *quantum* of damages, *I think it perfectly right. Whatever would have been due to Cox, is, by the assignment, transferred to Fenner."

Nares, Justice.—"I think this is a particular promise to the assignee, whenever any such should be. When, therefore, the assignment is executed, the money is demandable, by virtue of that *assumpsit;* and of consequence, this action well lies. I agree with my brother Blackstone, in respect to the *quantum* of damages."

De Grey, Chief Justice.—"At the trial, I gave an opinion, that in point of law, this action was maintainable, and I have seen no reason to change it. Were I now silent, it might be thought I had. But I am still satisfied, that the action will lie, abstracted of the particular evidence on which my brother Blackstone has founded his opinion. *Respondentia* bonds have been found essentially necessary for carrying on the Indian trade. But it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is, therefore, devised to operate upon subsequent assignments; and amounts to a declaration that, upon such assignment, the money which I have so borrowed, shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and therefore, I think, entitled also at law; for the defendant has promised to pay any person that shall be entitled to the money."

It will be observed, that there is no difference between the ground of Blackstone's opinion, and that of the other judges, excepting in this, that the former chose to ground his opinion upon the verbal promise, made after the assignment, and the others rested it upon the written promise on the back of the bond, made before the assignment; but all must have agreed that the debt was assignable, with the assent f the debtor.

The case of *Innes* v. *Dunlop*, 8 T. R. 595, was by the assignee of a Scotch bond, against the obligor. There were two special counts, and four money counts. To the two special counts, the defendant demurred. "Onslow, Serjeant, in support of the demurrer, objected, that the plaintiff, who was merely the assignee of a *chose in action*, could not sue in his own name, but should have brought the action in the name of Hunter & Co., the obligees in the bond. But The Court, after observing that this was not an action on the bond, said that they were clearly of opinion, that the assignment
*438] of the bond *to the plaintiff was a consideration for the *assumpsit* by the defendant, in the same manner as actions of *assumpsit* are maintained, in every day's practice, upon foreign judgments; and the defendant, by demurring, had confessed both the consideration and the *assumpsit*. And therefore, they gave judgment for the plaintiff." In a note to this case, the reporter refers to the case of *Fenner* v. *Meares*, 2 W. Bl. 1269, before cited. Although the declaration states, that "by reason of the premises" (viz., the making of the bond and the assignment to the plaintiff), "and according to the law of Scotland, the defendant became, and was indebted to the plaintiff, and being so indebted, in consideration thereof, promised to pay," &c., yet the law of Scotland does not seem to be the ground of the judgment, but the court rely entirely upon the assignment of the bond being a sufficient consideration for the *assumpsit*, agreeable to Judge Blackstone's opinion in *Fenner* v. *Meares*.

The case of *Reed* v. *Ingraham*, 3 Dall. 505, is a strong case in support of the principle that a contract may be made negotiable by the intention of the parties. It was an action in the supreme court of Pennsylvania, brought by the assignee of a stock contract, to recover the amount of the difference, due on the contract, which was expressed in these words:

"On the 18th of April 1792, I promise to receive from Joseph Boggs, or order, ten thousand dollars, six per cents, and pay him for the same at the rate of 23 shillings and 7 pence 3-4 per pound.

(Signed) Francis Ingraham."

The assignment was indorsed in these words:

"I do hereby authorize William Reed, or his order, to tender or deliver the stock

within mentioned, and the said William Reed, or his order, to receive for the same, the sums of money due and payable therefor, at the rates within expressed.

(Signed) Joseph Boggs."

The defendant had notice of the assignment before the day of payment, and the stock was duly tendered. The defendant contended that the contract was not negotiable, but that if it was, he had a right to offset against Boggs.

"By the Court.—The action is well brought, as it is founded on a contract in which the defendant expressly stipulates that he will receive the stock from, and pay the price to, Joseph Boggs, or his order. On general principles of law, stock contracts cannot be regarded *as negotiable; but a contractor may certainly make himself liable, as if they were so; and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case. With respect to the alleged inconvenience, that in the present form of action, the defendant is debarred from the benefit of a set-off, it would be enough to answer, that as this is the consequence of his own act and agreement, he has no reasonable cause of complaint. But it is also obvious, that when the contract was assigned, and the present action was instituted, there did not exist between him and Boggs any mutual debt or demand, which could be the subject of defalcation upon the principles of the act of assembly." Verdict for the plaintiff. [*439

Upon a policy of insurance, the person interested is allowed to bring an action in his own name, although not mentioned in the policy. 1 Show. 156. And a bill of lading has always been held to be assignable, and the assignee may bring an action in his own name, against the master or owners, for the goods. *Evans* v. *Martlett*, 1 Ld. Raym. 271; *Wright* v. *Campbell*, 4 Burr. 2051; *Caldwell* v. *Ball*, 1 T. R. 205; *Hibberts* v. *Carter*, Ibid. 745. In these cases, it was held, that the assignment of the bill of lading alters the property. So in the case of *Walker* v. *Walker*, 5 Mod. 13, Lord Holt held, that the cast of a die altered the property of the money in the hands of a stakeholder. Kyd 22, says, that notes payable to order have always been held to be negotiable." To these authorities may be added, that of the case of *Gerard* v. *La Coste et al.*, 1 Dall. 194.

From all these cases, it seems to be a maintainable proposition, that a man may make his debt negotiable, notwithstanding the principle that a *chose in action* cannot be assigned. Indeed, that principle seems to have been introduced for the purpose of preventing the creditor from transferring his right of action, contrary to the will of the debtor, but was not intended to apply to those cases where the debtor had expressly authorized his creditor to assign it.

4. The fourth point is, that no *indebitatus assumpsit* will lie without privity. This idea seems to have been founded upon the exploded doctrine, that *indebitatus assumpsit* will lie only in cases where debt will lie. But *even admitting the latter proposition to be true, yet it will not apply; for in the case of *Core* v. *Woddye* (and the other cases cited which were dependent upon it), it was held, that if a man receives money to my use, I may maintain an action of debt against him for it. Plowden, in the case of *Platt* v. *Locke* (Pasch., 4 Edw. VI.), which was an action of debt against the sheriff for an escape, fol. 36 *a*, *b*, says, "And so it appears, that the action upon the matter was maintainable, although there was not any contract between them; for upon a *liberate* delivered to the clerk of the Hanaper, who has assets in his hands, an action of debt will lie against him, as appears by 1 Hen. VII., and yet there is not any contract between them, nor any privity in words; and so in many like cases." [*440

In the case of *Wherwood* v. *Shaw* (44 Eliz.) 1 Brownl. 82, it was adjudged that although no contract was between the parties, yet when either money or goods are delivered, upon consideration, to the use of A., A. may have an action of debt. And of that opinion was Montague (28 Hen. VIII.), in *Core and Woddye's Case;* and also there is a precedent of such actions in the Book of Entries." s. c. Yelv. 23.

In *Jacob* v. *Allen*, 1 Salk. 27, an executor brought an action for money had and received against an attorney of an administrator, who had been appointed before it was known that there was a will, and it was held to lie, although the attorney had paid it

over to the administrator, before action brought. Here certainly was no privity of contract.

In *Hitchen* v. *Campbell*, 2 W. Black 830, it is said by the court, that, "the same principle which supports this action against one who receives money from the bankrupt himself, will support it against another who receives it under the bankrupt. In both cases, it is the property of the assignees. And though while this action was in its infancy (2 Jones 126; 2 Lev. 245), the courts endeavored to find technical arguments to support it, as by a notion of privity, &c., yet that principle is too narrow to support these actions, in general, to the extent to which they are admitted." In the same case, as reported in 3 Wilson 304, it is said by the court, "Whoever has received the money for the bankrupt's goods is supposed in justice to have received the same for the use of the assignees, in whom the property of those goods was, by law, vested; and to have promised to pay the same to the assignees; there is a supposed privity of contract between the persons whose money it lawfully is, and the person who has got or received it."

*441] *The same ideas are suggested by Lord MANSFIELD in the case of *Hawkes* v. *Saunders*, Cowp. 290. Indeed, among the innumerable cases in which the action for money had and received is the proper remedy, scarcely one can be found in which there exists any privity of contract between the parties. It lies to recover fees received by the defendant claiming a right to the plaintiff's office; as in the case of *Howard* v. *Wood*, 2 Jones 126; 1 Freem. 473, 478, where the action was brought to try the plaintiff's title to the office of steward of a court baron. "It was objected for the defendant, that this action did not lie, but only a special action on the case; and that this action is not only improper, but contrary to the truth of the case; for the plaintiff declares upon *assumpsit* for money received by the defendant to the use of the plaintiff, and the jury find that the defendant received the money to his own use, claiming the office of steward in his own right, and the money as fees incident to the office, which he had exercised contrary to the will of the plaintiff, and not otherwise due than by the exercise of the office. That this money was incident to the *tort* done by the defendant in the exercise of the office, and where a receipt depends merely on a *tort*, there can be no contract or privity, and without these, no debt, and by consequence, *indebitatus assumpsit* does not lie." But it was resolved by the whole court, that the action lay; for this is an expeditious remedy to facilitate the recovery of just rights; and this manner of action has now prevailed for a long time; and the point had been ruled often by the judges in their circuits, and actions frequently brought in this manner; and lately, upon solemn argument, in the court of exchequer, in the case of *Dr. Aris*, 2 Mod. 260, who brought such action for the profits of the office of comptroller in the port of Exeter, it was resolved by the Lord Chief Baron and all the court that the action lay." Here, the same exception was expressly overruled, which is now set up in the present action; and it has been uniformly overruled ever since. The same points were made and overruled in the case of *Dr. Aris*, above cited; and the court said, that *indebitatus assumpsit* will lie for rent received by one who pretends a title, and cited 4 Hen. VII. 6 *b*; and Moore 458. This was also agreed in *Hussey* v. *Fiddall*, 12 Mod. 324.

"In *assumpsit* for money received to the plaintiff's use, the question at the trial was—who was the yeoman of the black rod." 12 Mod. 607. It lies to try the title to a curacy. 3 Wils. 355. So, for money extorted by duress of goods. *Astley* v. *Reynolds*, 2 Str. 915, and *Irving* v. *Wilson*, 4 T. R. 485. And for money paid under an

*442] order of a court not having competent authority. **Newdigate* v. *Davy*, 2 Ld. Raym. 742. For a part of a sum of money paid, and the whole sum afterwards recovered by judgment. *Barbone* v. *Brent*, 1 Vern. 176. By a soldier against his captain, for the value of a horse lost in a storm. *Norris* v. *Napper*, 2 Ld. Raym. 1007. By a woman against a man who married her, having a former wife living, for rents of the plaintiff's lands received by the man. *Asher* v. *Wallis*, 11 Mod. 146. Against a sheriff, for money levied on a *fi. fa.* Comb. 430, 447; 1 Salk. 22; 6 Mod. 161. For the price of goods taken in execution, and sold under a warrant of distress upon a conviction, the conviction having been quashed. *Feltham* v. *Terry*, cited in *Lindon* v. *Hooper*, Cowp. 419. So, it lies against a stakeholder, on the determination of a wager. *Temple*

v. *Welds*, 10 Mod. 315. For money paid to insure lottery tickets, such insurance being contrary to law. *Browning* v. *Morris*, Cowp. 793. For a forfeiture undea byr -law of the corporation of barber-surgeons in London, 2 Lev. 252. So, it lies in disaffirmance of the contract, for the purchase-money paid for a thing not delivered. *Anon.*, 1 Str. 407. For money paid by mistake. *Buller* v. *Harrison*, Cowp. 567. *Ancher* v. *Bank of England*, 2 Doug. 637 (615). Against commissioners of bankrupt, for a dividend. *Brown* v. *Bullen*, Ibid. 408. Against the principal, if the money be paid over by the agent. *Cary* v. *Webster*, 1 Str. 480; *Sadler* v. *Evans*, 4 Burr. 1984. In the case of a fictitious payee of a bill of exchange, it was admitted, there was no privity, and yet the plaintiffs recovered on the count for money had and received. *Collins* v. *Emmit*, 1 H. Black. 313; *Tatlock* v. *Harris*, 3 T. R. 177; *Vere* v. *Lewis*, Ibid. 182; *Gibson* v. *Minet*, 1 H. Black. 586. In the following cases, there was no privity of contract, yet the plaintiff had judgment. *Starkey* v. *Mill*, Style 296; *Hornsey* v. *Dimocke*, 1 Vent. 119; *Harris* v. *Huntback*, 1 Burr. 374; *Moses* v. *Macferlan*, 2 Ibid. 1005; *Grant* v. *Vaughan*, 3 Ibid. 1516; *Clarke* v. *Shee and Johnson*, Cowp. 199; *Hitchen* v. *Campbell*, 2 W. Black. 827; s. c. 3 Wils. 308. These cases clearly show that the want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. If, then, the want of privity is no bar, what is there to prevent the plaintiff from recovering against the defendant? Is it, that he is not in justice entitled to the money? Or has the defendant a right to retain it? It is admitted, that the plaintiff may look to the intermediate indorser, and that *he* may recover from the defendant. The objection then is, that the defendant is not liable to the present plaintiff, but to the intermediate indorser, who alone is liable to the plaintiff. But the plaintiff may sue in the name of the intermediate indorser, "for" as Lord HOLT says in *Buller* v. *Crips*, "the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use;" and this court will prevent *the intermediate indorser from releasing the action, and from interfering in any other manner to frustrate the plaintiff's suit. Besides, a recovery and satisfaction in the present action will be a bar to any action which the intermediate indorser may bring against the present defendants, on the same note. Complete justice is done between both parties, in the shortest, least expensive, and least oppressive manner; and that circuity of action, which the "law abhors," is avoided. If the plaintiff recover against the intermediate indorser, and *he* against the defendant, the judgment will come down upon the defendant, charged with the heavy expenses of two suits, instead of one. The plaintiff will be turned round upon a mere point of form, and perhaps, may lose the debt altogether, by the insolvency of the intermediate indorser. If the indorsements are in blank, the plaintiff may strike out the intermediate indorsements, and declare as the immediate indorsee of the first indorser. Evans on Bills, 15; *Smith* v. *Clark*, 1 Esp. 180. For a blank indorsement authorizes the holder to fill it up with what he pleases, consistent with the nature and tenor of the instrument. So that, if privity is necessary, it is in the power of the plaintiff to raise it. But the cases before cited show that privity is not necessary to support the action for money had and received; and from the nature of the thing, it cannot be necessary, in any case where the instrument is negotiable, whether it be made so by the custom of merchants, by positive statute, or by the contract of the parties. [*443

5. The fifth proposition is, that a promise in writing, without a consideration expressed, is *nudum pactum*. This doctrine of *nudum pactum* seems not to be well settled, although much has been said upon the subject. It was considerably discussed in the case of *Pillans* v. *Van Mierop*, 3 Burr. 1663, but as there were other principles in that case, it was not necessary to decide absolutely upon this point. Yet the whole court seemed strongly inclined to the opinion, that the rule, *ex nudo pacto non oritur actio*, did not apply to a promise in writing. Lord MANSFIELD said, "A *nudum pactum* does not exist in the usage and law of merchants. I take it, that the ancient notion about want of consideration was for the sake of evidence only; for when it is reduced to writing, as in covenants, specialties, bonds, &c., there was no objection to the want of

consideration. And the statute of frauds proceeded upon the same principle. In commercial cases amongst merchants, the want of consideration is not an objection."

*444] *Mr. Justice WILMOT.—"I can find none of those cases that go upon its being *nudum pactum*, that are in writing; they are all upon parol. I have traced this matter of *nudum pactum;* and it is very curious." He then explained the principle of an agreement being looked upon as a *nudum pactum*, and how the notion of *nudum pactum* first came into our law. He said, "it was echoed from the civil law. '*Ex nudo pacto non oritur actio.*' Vinnius gives the reason in lib. 3, tit. *De Obligationibus* (4to ed.) 596. If by stipulation (and *à fortiori*, if by writing), it was good, without consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either writing or certain formalities were required. Id., on Justinian (4to ed.) 614. Therefore, it was intended as a guard against rash, inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorf hold them obligatory by the law of nations. Grot. lib. 2, c. 11, *De Promissis;* Puff. lib. 3, c. 5. They are morally good, and only require ascertainment. Therefore, there is no reason to extend the principle, or carry it farther. There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing."

Mr. Justice WILMOT then refers to a passage in Bracton, which will be considered presently, and proceeds thus: "Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308 *b*, in the case of *Sherynton and Pledal* v. *Strotton and others*, mentions it; and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base), and contracts or agreements in writing (which are more high), and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said: 'Words pass from men lightly; but where the agreement is made by deed, there is more stay,' &c. The delivery of a deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed to the other; and, therefore, a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration." "The voidness of the consideration is the same, in reality, in both cases; the reason of adopting the rule was the same in both cases; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise. Therefore, if it stood only upon the naked promise, its being

*445] in this case reduced into writing, *is a sufficient guard against surprise; and therefore, the rule of *nudum pactum* does not apply in the present case. I cannot find that a *nudum pactum*, evidenced by writing, has ever been holden bad; and I should think it good; though, where it is merely verbal, it is bad. Yet I give no opinion upon its being good always, when in writing." "It has been melting down into common sense, of late times." YATES and ASTON, Justices, concurred in opinion, nearly on the same grounds.

This opinion of the court in *Pillans* v. *Van Mierop*, does not seem to be contradicted by any subsequent case, so far, at least, as it affirms this principle, that a written promise carries with it *primâ facie* evidence of a good consideration (until the contrary appears), and throws the burden of proof upon the opposite party. So that in an action between the original parties, upon a promise in writing, it does not seem to be necessary to aver a consideration.(*a*) Blackstone's opinion (2 Com. 446) goes fur-

(*a*) At the time this argument was made, the writer had not seen the case of Rann *v.* Hughes, in the house of lords, reported in a note to the case of Mitchinson *v.* Hewson, 7 T. R. 350, which is said, in a note to the third edition of Doug. 683, to have been decided 14th of May 1778, and to be reported in 7 Bro. Parl. Cases 550. Nor is the case mentioned by Powell or Fonblanque, in treating of this subject.

The Lord Chief Baron SKYNNER, in delivering the opinion of the judges, has these observa-

ther than this, for he says, "if a man gives a *promissory note, he shall not be allowed to aver the want of a consideration, in order to evade the payment; for every note, from the subscription of the drawer," "carries with it internal evidence of a good consideration." The case, however, which he cites from Ld. Raym. 760, does not bear him out in the full extent of his proposition; for the court said, that "though no consideration was expressed in Hurst's note, yet the note, being subscribed by Hurst, was good evidence of a debt due from Hurst to the plaintiff."

There is certainly a difference between good evidence, and incontrovertible, or conclusive evidence. The expression good evidence, seems to imply only *primâ facie* evidence. And this seems to be the extent of the proposition, as it applies in an action between the original parties to a note, for when it is negotiated, and the action is between an indorsee and the maker, the latter will not be allowed to aver the want of a consideration, because "its operation is then governed by the same law as a bill of exchange, which is the law-merchant; and that is founded upon the law of nature and nations, in which the want of a consideration is no essential defect in the contract" (1 Powell on Contracts, 341), and in which the great leading principle is, *fides est servanda*. 1 Fonbl. 338, note d.

Powell and Fonblanque have both controverted the doctrine as laid down by Wil-

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tions: "But it is said, that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be, where the promise is put in writing;" "but whatever may be the rule of the civil law, there is certainly none such in the law of England." His lordship observed upon the doctrine of *nudum pactum* by Mr. J. Willmot, in the case of *Pillans* v. *Van Mierop and Hopkins*, 3 Burr. 1663, and that he contradicted himself, and was also contradicted by Vinnius, in his comment on Justinian.

"All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavered to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. But it is said, that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed, that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of, as all other agreements in writing are, by the common law, and does not prove the converse of the proposition, that, when in writing, the party must be, at all events, liable. He here observed upon the case of *Pillans* v. *Van Mierop*, in Burr., and the case of *Losh* v. *Williamson*, Mich., 16 Geo. III. in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate, that they were erroneous. He said, that all his brothers concurred with him, that in this case, there was not a sufficient consideration to support this demand, as a personal demand, against the defendant, and that its being now supposed to be in writing, makes no difference."

This case, as far as it goes, must be considered as having decided the law in England, where the decisions of the highest court of judicature are regarded as binding. But in this country, it can only be respected as an opinion; and the question is still open as to the grounds of that opinion.

It is not contended, that a promise in writing cannot be a *nudum pactum*; but the question is, whether the burden of proof is not thrown upon the promisor; or whether the writing does not raise a *primâ facie* presumption of a good consideration. How far this question is affected by the case of *Rann* v. *Hughes*, is left to the consideration of the reader.

If a promissory note is admitted to be a mercantile instrument, and governed by the law-merchant, the question of *nudum pactum* cannot arise in the present case. For it is believed to be settled law, that "a *nudam pactum* does not exist in the usage and law of merchants."

Browne, in his View of the Civil Law, vol. 1, p. 558, in a note speaking of writings not under seal, as considered at common law, says, "they may be evidence of the agreement, or intent of the parties, but not conclusive evidence of sufficient consideration;" and cites the case of *Rann* v. *Hughes*.

MOT, in the case of *Pillans* v. *Van Mierop*, and by Blackstone, in the passage above cited; but their arguments only go to prove, that a note in writing is not conclusive and incontrovertible evidence of a good consideration between the original parties; and it is believed, a case cannot be found, in which the plaintiff has been put to prove the consideration of a written promise, by a mere denial on the part of the defendant. It
*447] seems to be the rule, that the plaintiff is not obliged to *prove the consideration of such a promise, until the defendant has proved circumstances tending to destroy the presumption arising from the written contract. Powell and Fonblanque have taken opposite premises, and yet both draw the same conclusion. The former says (in his Essay on the Law of Contracts, vol. 1, p. 340), "Now, it seems reasonable to conjecture, that when this maxim of the Roman law, '*quod ex nudo pacto non oritur actio*,' was adopted and received into our system, it was adopted in its full extent."

Fonblanque (vol. 1, p, 326, note a) says, "The civil law is so generally referred to in the discussion of this subject, that it may be material to take a cursory view of the different means by which a legal obligation was created by that law, in order to show that though we have borrowed the phrase *nudum pactum* from the civil law, and the rule which decides upon the nullity of its effect, yet that the common law has not in any degree been influenced by the notions of the civil law, in defining what constitutes *nudum pactum*." He then cites authorities to show that by the civil law a promise in writing might be a *nudum pactum*, and therefore, not capable of supporting an action, and hence seems to infer that such is the rule of the common law.

However, both Wilmot and Blackstone are supported by Bracton, who appears to be the first writer upon the English law, who has noticed the doctrine of *nudum pactum*. Bracton has certainly interwoven many of the principles of the civil law with his observations on the common law, but it is believed, he has done it only in cases where the common law has recognised those principles. The passages of Bracton, alluded to by WILMOT, in the case before cited, are the following: Book 3, c. 1, § 2, p. 99. edition of 1640. "*Videndum est etiam unde actio oritur? Et sciendum est, quod ex obligationibus, tanquam à matre, filia. Obligatio autem, quæ est mater actionis, originem ducit et initium ex aliqua causa præcedente, sive ex contractu vel quasi, sive ex maleficio vel quasi. Ex contractu vero oriri poterit multis modis, sicut ex conventione, per interrogationes et responsiones, ex conceptione verborum quæ voluntates duorum in unum trahit consensum, sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita; quæ, si nuda fuerint, exinde non sequitur actio, quia ex nudo pacto non nascitur actio. Oportet igitur quod habeat vestimenta, de quibus inferius dicendum est.* In the next chapter, § 1, in the same page, he tells us what are those *vestimenta* which prevent pacts from being nude. *Est enim obligatio, quasi contra ligatio, et quatuor*
*448] *habet species, quibus contrahitur, et plura vestimenta. Contrahitur enim re, verbis, *scripto, consensu, traditione, junctura, quæ omnia dicuntur vestimenta pactorum.*"

And in § 9 of the same chapter, he says, "*Inventæ autem sunt hujusmodi stipulationes et obligationes ad hoc, quod unusquisque habeat et sibi acquirat quod suâ interest, si contra ea agatur quæ in stipulationem deducuntur. Et si res in stipulatione deducta alii detur, nihilominus intererit stipulatoris, quia ille qui promisit, tenebitur ad interesse, vel ad pœnam, si pœna fuerit in stipulationem deducta. Per scripturam verò obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit, sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere. Et non solum obligatur quis per verba, sed per scripturam, et per literas, non ut literæ quidem ipsæ, vel figura literarum obliget, sed oratio significativa quam exprimunt literæ; sed utrumque cooperatur ad obligationem, oratio significativa cum litera.*"

These expressions of Bracton are strong and clear; and if he is to be considered as only borrowing terms from the civil law to express his ideas of the common law, they are certainly conclusive.

The reason of the rule seems to be truly given by Plowden, in the cases cited by Mr. Justice WILMOT; and if a written promise is not within the reason of the rule, it

would seem, that the rule cannot apply. In the ancient books, no notice is taken of any written agreements but those under seal; and the reason probably is, that in those times by far the greater part of the people could not write, so as to sign their names to an instrument. Hence, a seal was substituted for a signature; not because it was a more solemn act, but from the necessity of the case. Witnesses also were produced for identifying the seal, and not to add to the obligation of the contract. But the difference between sealed instruments and others has now become obsolete in practice; for there is no case of a contract, where the interests of third persons are not involved, in which the defendant may not, either at law or in equity, avail himself of the want of consideration. And the most trifling consideration is now held sufficient to take even parol contracts out of the rule of *nudum pactum*.

In *Bunniworth* v. *Gibbs*, Style 419, Chief Justice ROLLE said, "a little consideration will serve to ground a promise on." Blackstone (1 Com. 445) says, "any degree of reciprocity will prevent the pact from being nude." And WILMOT (3 Burr. 1666), said, "the least spark of a consideration will be sufficient." In *Fenner* v. *Meares*, *2 W. Bl. 1271, Judge BLACKSTONE said, that "the assignment and other [*449 transactions were fully sufficient as a consideration to make the *assumpsit* to the assignee binding." And in *Hawkes* v. *Saunders*, Cowp. 290, Lord MANSFIELD said, that "a legal or equitable duty is a sufficient consideration for an actual *assumpsit*;" and that it "was too narrow ground," to say, that "there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made." And BULLER declared the true rule to be, "that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." But even admitting that the rule of *nudum pactum* applies to written contracts, yet in the present case, there is a sufficient consideration. For, according to Judge BLACKSTONE, "the assignment and other transactions," and particularly the payment of the money by the intermediate indorser to the defendant, were certainly sufficient consideration to support the *assumpsit*.

Upon the whole, therefore, whether this case be considered upon the ground of a promissory note, before the statute of Anne, or upon general principles of common law, the count for money had and received seems to be well supported by the evidence offered.

IX. It is believed, that no case has been reported in Virginia, in which this question has been decided. There are cases, however, which may possibly be considered as affecting some of the principles involved in the present inquiry.

In *Mackie* v. *Davis*, 2 Wash. 229, it is held, that the assignee of a bond may maintain *indebitatus assumpsit* for money had and received, against the assignor, upon principles of common law. There are, in that case, several assertions and admissions of counsel which are deemed not to be correct, but are warranted only by a few immature observations of some of the writers, since the statute of Anne. One of the counsel seems to consider the custom of merchants as no part of the common law. This has been shown to be an incorrect position, by the concurrent adjudications of a long series of years. It is said also, that "as to promissory notes, the right of recovery against the indorser is expressly given by the statute of Anne, and from this provision, an invincible argument is to be drawn in favor" of the defendant, "for, if in a commercial country like England, it was necessary for the legislature to provide a remedy against the indorser of a promissory note, it is obvious, that no such right existed at common law." But if the statute of Anne was in affirmance of the law as it stood before, and only enacted to remove the doubts which *had been raised by Lord HOLT'S [*450 decision in *Clerke* v. *Martin*, then this argument totally fails. And that such was the fact is believed to be proved by the authorities before cited.

One of the counsel for the plaintiff considered the case as standing on the same ground as notes of hand did, before the statute of Anne; and denies that notes were within the custom of merchants, for which he cites Kyd as an authority; but Kyd says only "that it was held," &c., and relies on the case of *Clerke* v. *Martin*, and the preamble of the statute. And in the same manner, every like assertion in the modern

books may be traced up to the same source. The only authority which can support the position is the case of *Clerke* v. *Martin*.

The statute of Anne having put the question at rest, no one has taken the pains to examine the real state of the law, prior to the statute, but one writer after another has repeated the assertion, without the least examination. In England, it is of no importance, whether they are correct or not; but in this country, where few of the states have adopted the statute, it becomes interesting to know how the law really stood before. In the case of *Mackie* v. *Davis*, the counsel and the court place much reliance on the privity between the indorser and his immediate indorsee, and it is evident, that they borrowed their ideas from Kyd on Bills 114. But Kyd cites no authority for his observations; nor are they warranted by any adjudged case, at least, so far as they apply to the action for money had and received. Judge ROANE says, "The case of promissory notes will be an important guide, and therefore, it will be proper to see how they stood previous to the statute, which it is supposed created the liability of the indorser of them." But he proceeds no farther in his investigation, than to the case of *Lambert* v. *Oakes*, 20th May, 11 Wm. III. He says, "this case was decided antecedent to the statute of Anne, and was, consequently, governed by the principles of the common law. If he considered the custom of merchants as part of the common law (as it really is), he was certainly correct. But the probability is, that the declaration was in that case grounded on the custom of merchants: 1st. Because that was the usual and established form of declaring on promissory notes in those days: 2d. Because there had not at that time been a distinction discovered between a promissory note and an inland bill of exchange: 3d. Because there never was, either before or since the statute of Anne, a time when an indorsed promissory note was not considered as a bill of exchange: and 4th. Because four out of the five reporters of that case call it a bill of exchange, and even Lord Raymond himself calls it a bill, throughout his whole report, except in the first line, where he calls it a note.

*451] *Judge ROANE further says, that "bonds, in England, are not assignable, and therefore, stand in the same situation as notes of hand did at the time when this case was determined." It is believed, upon the authority of the cases already cited, that there never was a time when a promissory note payable to order was not assignable, and even Lord HOLT, subsequent to the case of *Clerke* v. *Martin*, admitted, in the case of *Buller* v. *Crips*, that an indorsement of such a note would create a negotiable bill.

In the case of *Norton* v. *Rose*, 2 Wash. 240, the counsel admit that goldsmiths' notes "circulated like bills of exchange" before the statute of Anne, and yet it is contended, that promissory notes derived their whole negotiability from the statute. But goldsmiths' notes were simply promissory notes, and were not more negotiable than the promissory notes of any other description of persons. Again, the same counsel observes, "that though notes of hand, according to the statute of Anne, were placed on the same ground with bills of exchange, and of course, governed by the same rules, the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange, in this country, and thereby gave a convincing proof that it was not their intention to suffer bonds to be governed by those rules which apply to bills." And in confirmation of his argument he cites 1 Dall. 23. Judge ROANE observes, "that notes of hand are now assignable in England, and it is admitted, that the assignee is discharged of any equity which existed against the assignor, unless the note was given for a usurious or gaming consideration. The reason of this is, not that the principle attached to them as a legal consequence of their being made assignable, but because this rule, for commercial purposes, applied to bills of exchange; and the statute of Anne, declaring notes assignable in like manner as bills of exchange, showed an intention, as it was supposed, to render the former as highly negotiable, and as current in internal, as the latter were in external commerce. The act of our assembly embraces equally the subject of bonds and notes, but contains no expressions tending to induce a belief that the making them assignable was intended for purposes of commerce. The design certainly was to make them transferable to a certain extent; the provision points

out the limits of their negotiability, and fixes a strong mark of distinction between them and bills of exchange. As to the latter, they were assignable, and the indorsement transferred a legal right to the indorsee. They did not owe this quality to statutory provisions, and of course, they continued within that principle which had attached to them, and of which they were not deprived by any statute." He then cites the case of *Peacock* v. *Rhodes*, 2 Doug. 636, *where Lord MANSFIELD observes, that the indorsee of a promissory note or bill of exchange is not to be considered in the light of [*452 an assignee at common law, because it would stop their currency, and injure trade and commerce.

He then proceeds: "It is, therefore, not because the indorsee is the assignee of the legal right to such bills and promissory notes, that the equity is barred by the indorsement, but because of their quality as a currency, and from the necessity of adopting such a principle, for the convenience of trade and commerce with respect to such currency. But bonds are not to be considered as a currency, and within the reason of the principle laid down in *Peacock* v. *Rhodes;* for that principle is founded on commercial considerations altogether, and not upon a distinction between legal and equitable assignments. The provision of this act has long governed the assignment of bonds, and it is but of late years, that the existence of such a principle, as has been contended for in this cause, has been thought of as applicable to bonds and notes."

CARRINGTON, Justice.—"To consider this case upon general principles, the question is, whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice? In England, notes of hand were not assignable until the 3d & 4th of Queen Anne, so as to enable the assignee to bring suit in his own name. Courts of equity were, of course, resorted to, where the maker of the note was not precluded from setting up any equitable defence which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them upon the same footing of negotiability with bills of exchange. But the judges still considered them as evidences of debt. At length, the statute was procured conformable with the wishes of the trading part of the community, making them assignable in like manner as bills of exchange. The likeness, thus strongly sanctioned by legislative authority, produced similar decisions, in cases where their negotiability was concerned. But no efforts were made in favor of bonds, and they remain in the same situation in England, as they stood at common law. This country was then a part of the British empire, and our legislature assimilated its laws to those of the mother country, so far as our local situation and state of society authorized it. In 1705, shortly after the English statute passed respecting notes of hand, the assembly passed a law authorizing the assignment of bonds and notes. This law I cannot meet with, but it was repealed by proclamation in 1730, and in the same year, another law was enacted, exactly similar to the act of 1748. *With the English statute before their eyes, [*453 the legislature did not choose to adopt it altogether, or to introduce into it a principle which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negotiability of bonds and notes was qualified and restricted within bounds consistent with the commercial station of this country. There was no necessity for exalting those kinds of papers to the high ground on which the commercial world had placed bills of exchange, and the whole complexion of the law shows that it was intended to be avoided. The doctrine which has been stated and relied upon, as applicable to foreign bills of exchange, is, consequently, inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long-formed opinions, unless the expressions of the law rendered it absolutely necessary. That a bond, fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid, by assignment, is settled by the case of *Turton* v. *Benson*, and has uniformly been so decided in the courts in this country. No man

can, by the mere act of assignment, transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid that which was originally vicious and void, in this enlightened age though, former decisions are rejected, and a new mode of attaining justice is discovered. But is it true, that the means are adequate to the object? It is urged, as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions on the public, and to cramp commerce, by destroying the negotiability of bonds and notes. As it strikes me, they rather tend to prevent than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public to the avarice and injustice of a few. But I cannot perceive how commerce, or that sort of it which is most useful to society, can be injured. That their negotiability will be restrained, I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts, and thereby affording a convenient and desirable accommodation to the people of this country."

Judge Lyon, in giving his opinion, observed, that "the arguments used to assimilate this to the case of a bill of exchange and promissory note, are totally without foundation. The reason of the law, *as applicable to those cases, is not founded upon the principle stated by the counsel for the appellee, but upon considerations altogether of a commercial nature." *454]

These observations certainly claim great respect, not only as coming from the highest court of judicature in Virginia, but as containing the opinions of gentlemen high in the confidence of the people of that state, and whose decisions have been so generally correct. But still their weight depends upon the accuracy of the facts on which their opinions are founded, and the correctness of the arguments derived from those facts. In this case of *Norton* v. *Rose*, the question was not upon a promissory note, but whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. Hence, what is said respecting promissory notes comes in incidentally, and was not properly before the court. The decision, as far as it respects the question before the court, seems to be correct.

The observations in these cases from Virginia, respecting promissory notes, may be reduced to three propositions. 1st. That promissory notes were not negotiable, before the statute of Anne, so as to enable the indorsee to bring an action in his own name. 2d. That the act of assembly, by assimilating notes to bonds, shows an intention in the legislature to restrain the negotiability of both within the same limits. 3d. That the negotiability given by the act of assembly to bonds and notes was not "intended for purposes of commerce."

The first of these propositions is clearly incorrect. It never was doubted, until the case of *Clerke* v. *Martin*, in the first year of Queen Anne, that a promissory note was a bill of exchange, even between the payee and the maker. And no case has yet decided, that a promissory note, payable to order and indorsed, is not a good bill of exchange. It was never doubted, until the case of *Buller* v. *Crips*, in the second year of Queen Anne, and that case was never decided. Judge Carrington says, "courts of equity were, of course, resorted to;" that is, because the indorsee could not bring a suit at law in his own name. If this was the case, it must have happened between Michaelmas term, 2 Anne, when *Buller* v. *Crips* was argued, and 3 & 4 Anne, when the statute was enacted. For before the 2d Anne, the indorsee could bring and support a suit in his own name, at law, against the maker or any or all of the other *parties to the note. The case of *Buller* v. *Crips* only raised a doubt, and the statute followed immediately and dispelled it. No case, it is believed, can be found of an application to equity on the grounds suggested by the judge. *455]

The second proposition, that the act of assembly, by assimilating notes to bonds, intended to restrain their negotiability within the same limits, contains an argument which, if used at the trial, was not much insisted on, but which seems to be the only ground upon which a doubt can be supported. It is much to be regretted, that the act of 1705, c. 34, is not to be found, as it would probably throw some light upon the subject. Its title does not, like that of its successors, mention promissory notes. It is

"an act declaring how long judgments, bonds, obligations and accounts shall be in force; for the assignment of bonds and obligations; directing what proof shall be sufficient in such cases, and ascertaining the damage upon protested bills of exchange."

Whether the legislature of Virginia, at the time of passing this act, had before them the statute of 3 & 4 Anne, c. 9, is very doubtful. It is not probable, that the acts of that session of parliament were printed, until some time after the end of the session, which was on the 14th of March 1705, on which day, the statute of Anne respecting promissory notes received the royal assent. The Virginia assembly of 1705 met on the 23d of October, in the same year. There does not seem to have existed any particular motive for transmitting, in the most expeditious manner, the new acts of parliament; and if their transmission was left to accident, as was probably the case, the presumption is (especially, as it was a time of war), that the legislature of Virginia had no knowledge of the English statute, until after their session of 1705. But however this may be, there is at present no evidence that promissory notes were made assignable by that act of assembly.

The act of 1730, c. 5, is entitled "an act for ascertaining the damage upon protested bills of exchange; and for the better recovery of debts due on promissory notes; and for the assignment of bonds, obligations and notes." As the act of 1705 was repealed by proclamation, in 1730, it is not probable, that the new act of that year would re-enact the same thing in substance. Hence, a material variance may be presumed between the two. The act of 1730, c. 5, § 8, is as follows: "And to the end the recovery of money upon promissory notes, and other writings without seal, may be rendered *more easy, be it enacted, &c., that if any person or persons shall have signed, or hereafter shall sign, any note, or by any other writing, he, she or they have [*456 promised or obliged, or shall promise or oblige him, her or themselves, to pay any sum of money, or quantity of tobacco, to any other person or persons, such person or persons, to whom the same is or shall be payable, shall and may commence and maintain an action of debt, and recover judgment for what shall appear to be due thereupon, with costs." And by the 11th section, it is enacted, "that it shall and may be lawful to and for any person or persons to assign and transfer any bond or bill for debt, or any such note as aforesaid, to any other person or persons whatsoever: and that the assignee or assignees, his and their executors and administrators, by virtue of such assignment, shall and may have lawful power to commence and prosecute any suit at law, in his, her or their own name or names, for the recovery of any debt due by such bond, bill or note, as the first obligee, his executors and administrators might or could lawfully do: provided always, that in any suit commenced upon such bond, bill or note, so assigned the plaintiff shall be obliged to allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee."

The intention of this act seems clearly to be to extend and enlarge, and not to restrict or limit, the negotiability of the instruments of which it speaks. Such bonds, bills and notes as are described in the act, certainly were never negotiable or assignable at common law; and for this plain reason, because it was not the intention of the parties to make them assignable. The debtor had never consented to the making his debt negotiable; it would, therefore, have been unjust in the legislature, not to have given him the full benefit of all discounts against his original creditor as well as against the assignee. The notes described by the act are those by which the signer shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to any other person. Such a note is not negotiable in its nature, nor by the original contract and intention of the parties; the signer never gave any authority to his creditor to negotiate it, and therefore, legislative aid was necessary to render it negotiable. But legislative aid was never necessary to render negotiable a promissory note, payable to order. Let it be again repeated, that although promissory notes had been in common use in England, for more than half a century before the statute of Anne, yet there never was an adjudged case, in which it was decided, that an indorsee of such a note could not maintain an action in his own name against any of the parties to the note; but the whole course of decisions was uniformly to the contrary. There was no *ne- [*457

cessity, therefore, for the Virginia assembly to provide for the negotiability of notes payable to order, and hence we find, that they confine the act to bonds, bills and such notes as, at common law, stood upon the same ground as bonds; and were considered as mere *choses in action*, unassignable in their nature, and only simple evidence of a debt due by one man to another. Although it must be presumed, that the legislature of Virginia, in 1730, had full knowledge of the statute of Anne, yet it is equally to be presumed, that they knew that it was made in affirmance of the law as it before existed, and solely to remove the doubts which had been suggested by Lord HOLT. It must also be presumed, that they knew what had been the uniform practice and course of adjudications, ever since the first introduction of promissory notes. The evidence which we still have of these facts is strong and clear; but it must have been more strong and clear, in the year 1730, when many persons were living, who probably had personal knowledge of the whole history of the statute of Anne. Hence, then, it may be fairly concluded, that the assembly intended to leave those instruments which, in their own nature, and by the consent of the parties, were negotiable, as well as those which were negotiable under the custom of merchants, to the protection of such principles of law as had been already found sufficient to support them.

The act of 1748, c. 27, has precisely the same title as the act of 1730, and precisely the same provision as to the assignment of bonds, bills and notes, making use of exactly the same expressions, excepting that the words "before notice of such assignment was given to the defendant," are added, immediately after the word "obligee," in the last line of the passage before cited. So that this act of 1748 gave the assignee of such bonds, bills and notes, the same remedy at law, which he had before in equity; and this seems to have been the only use and intent of the act.

The act of 1786, c. 29, § 3 and 4, is in these words: "An action of debt may be maintained upon a note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another. Assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco shall be valid; and an assignee of any such may, thereupon, maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." This act, although its language is more concise, does not, as it respects the present question, differ in substance from the act of 1730. It is evident, that it refers to the same kind *of notes. If notes payable to order were negotiable, before the passing of these acts, it is clear, that there is nothing contained in either of them to restrict that negotiability. This brings us back to the inquiry, what was the law respecting such notes previous to the statute of Anne. If an indorsed promissory note, payable to order, was in its nature an inland bill of exchange, and if, in practice, it was always so considered, there is nothing in the acts of assembly of Virginia that forbids its being still considered as such. How and when did the law first obtain in Virginia, respecting inland bills of exchange? Nothing is said of them in the statute law of Virginia, until the act of 1786, c. 29, which adopts the provisions and nearly the words of the English statute of 9 & 10 Wm. III., c. 17, and 3 & 4 Anne, c. 9. Their negotiability is taken for granted, and must have been derived from the custom of merchants. But the same custom which gave negotiability to inland bills of exchange, gave equal negotiability to indorsed promissory notes, payable to order: it made no distinction between them. What the practice has been in Virginia seems doubtful; lawyers differ in their accounts of it; and it cannot be considered as settled.

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The case of *Lee* v. *Love*, 1 Call 499, was by the indorsee against the indorser of a promissory note, payable to order. The count relied upon was money had and received. But the court held, that the plaintiff was not entitled to recover against the defendant, because he had not first brought suit against the maker of the note. It is to be regretted, that the court did not give their reasons for supposing such a suit necessary. It was said, that they considered the case as having been already decided; and they probably alluded to the case of *Mackie* v. *Davis*, as that is the only case cited

by the counsel for the defendant. But this point was not decided in that case. Judge CARRINGTON said, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough." Judge ROANE said, "In this country, the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject; it is, therefore, his duty to bring suit." The duty of bringing a suit does not, at the first glance, seem to be the inevitable consequence of a right to sue; and it is regretted, that the intermediate terms were not hinted, which connect the conclusion with the premises. But the *dictum* of a single judge, however respectable, upon a point not necessary to support the judgment, cannot be considered as conclusively settling the law. The only points decided in that case were, that an assignee of a bond might maintain *an action for money had and received against the assignor; and that the assignee had done enough to entitle himself to such action, [*459 by bringing suit against the obligor, prosecuting it to judgment, and taking out a *fieri facias*, which was returned *nulla bona*. These seem to be all the reported cases in Virginia, which bear upon the present question.

In Pennsylvania, a number of cases have occurred, from the whole of which it appears doubtful, whether the statute of Anne is to be considered as having been extended in practice to that state, or whether their actions upon promissory notes are grounded upon the custom of merchants. Their act of assembly of 28th May 1715, seems to have been passed in the full contemplation of the statute of Anne, but it provides a right of action only for the indorsee against the maker, and that only to recover so much "as shall appear to be due at the time of the assignment, in like manner" as the payee might have done. But it gives no action to the payee against the maker, nor to the indorsee against any of the indorsers. Yet such actions are maintained in that state upon promissory notes, considered as instruments. Judge SHIPPEN, in the case of *Robertson* v. *Vogle*, 1 Dall. 252, says, "there can be no doubt, that the right of indorsees to call upon the indorsers must be founded on the custom of merchants." It appears by their act of assembly, that a right of action already existed by the payee against the maker; and Judge SHIPPEN supposes it to be under the statute of Anne, which he imagines had been extended in practice to that state. But this could hardly have happened, prior to the year 1715 (the date of their act of assembly), which was only ten years after the statute of Anne. He observes also, that "the legislature, when regulating the assignment of bonds and notes, though they did not expressly put them on the same footing with bills of exchange, must, from the terms of the act, have taken it for granted, that an action might be brought upon a promissory note, considered as an instrument. Till, therefore, a contrary opinion is pronounced, we must proceed as in the case of a bill of exchange, under the statute of Anne," &c.

But in the subsequent case of *McCulloch* v. *Houston*, in the supreme court of Pennsylvania, 1 Dall. 441, Chief Justice MCKEAN was of opinion, that the legislature intended to put promissory notes on the same footing as bonds, at least, so far as to admit the equity of a note to follow it into the hands of the indorsee. He says, "before this act, it appears, that actions by the payee of a promissory note were not maintained, nor can they since be maintained, otherwise than by extending the English statute of Anne." And to account for this *extension of the statute, he supposes, "that [*460 actions upon promissory notes were brought here, soon after the passing of the statute, by attorneys who came from England, and were accustomed to the forms of practice in that kingdom, but did not perhaps nicely attend to the discrimination with regard to the extension, or adoption, of statutes." But this could not have happened in the course of ten years, so as to have established a practice; for we are first to suppose a practice in England under the statute, a subsequent removal of attorneys from England to Pennsylvania, and then a practice in Pennsylvania to be established, and all this between the passing of the statute of Anne in the year 1705, and the act of assembly in 1715. A more probable conjecture seems to be, that the first settlers who came over from England about the year 1683, were well acquainted with the use of promis-

sory notes, and the laws respecting them, as they had been practised upon in that country, for at least thirty years. The first emigrations to Pennsylvania were about the time when the banking business of the goldsmiths was at its greatest height, and it was fifteen or twenty years after the first settlement of Pennsylvania, before a doubt was suggested, whether an action would lie on a promissory note, as an instrument. Hence, it is probable, that actions on such notes were brought in the same manner as they had been used in England, to wit, on the custom of merchants; and upon that ground, and not upon the statute of Anne, probably rests the present practice in Pennsylvania.

The practice in New Hampshire and Massachusetts seems to have the same foundation. They declare upon promissory notes, as instruments, and rely upon the express promise in writing, without alleging a consideration, or referring to any statute or custom whereby the defendant is rendered liable, without a consideration. In Connecticut, it is said by Swift, in his System of the Laws, that the indorsee must sue in the name of the payee; but the payee can maintain an action upon the note, without alleging any custom, or statute or consideration. In New York, they have nearly copied the statute of Anne, as far as it relates to promissory notes, but how the law was considered, before their act of assembly of 1788, we are not informed. In Maryland, the statute of Anne was considered as in force and always practised upon. Their declarations have been precisely in the English form, alleging the defendant to be liable by force of the statute, and the courts have strictly adhered to the adjudications in England. Hence, nothing conclusive can be inferred from the practice of the states.

The third proposition drawn from the reported cases in Virginia is, that the negotiability given to bonds and notes by the act of assembly *of that state, was not
*461] intended for purposes of commerce. It seems difficult to assign a reason why the legislature should have made bonds and notes assignable, unless it was to enable people to transfer that kind of property which existed in such bonds and notes; and the transfer of property is the only means of commerce. It will not be contended, that the sole object of the legislature was to enable the holders of such paper to give it away in voluntary donations. It must, therefore, have been intended to enable them either to pass it away, in payment of debts previously contracted in the way of commerce, or to make it in itself an article of merchandise. If, therefore, for the purposes of commerce, the legislature intended to make those contracts negotiable, which were not so, either in their nature or by the consent of the parties, it is fair to presume, that they did mean to impede the negotiability of such as were in their own nature negotiable, and were expressly intended to be made so, by the will of the contracting parties? If there were any principles of law which would support the negotiability of a promissory note, payable to order, it cannot be supposed, that the legislature intended, by implication alone, to obstruct their operation. And even admitting that they did not, by the act making bonds and notes assignable, mean, to aid commerce, yet it cannot be presumed, that they intended to wage war with those commercial principles which were already established.

This brings us back again to the first inquiry, what were the principles upon which the negotiability of promissory notes was supported, before the statute of Anne? If such principles did exist, there seems to be nothing in this act of assembly which prevents their full operation in Virginia.

The conclusion from the whole is, that there is no principle derived either from the common law, or from the act of assembly of Virginia, which will prevent a court of law from carrying into effect the contract of the parties, according to their original intention. Even admitting, that the contract of the defendant is not negotiable at law, so as to enable the plaintiff to declare upon the instrument itself, yet it cannot be denied, that it is assignable in equity, and if so, the plaintiff becomes, in equity, entitled to the money which the defendant received from the intermediate indorser; and in such a case, there never has been a doubt, since the time of Lord Mansfield, that the plaintiff is entitled to recover in an action for money had and received.

*Note (B) to Lindo *v.* Gardner, *ante*, p. 345.

This case was much debated in the court below. It appeared from the books, that the only reported case in which it had been decided that an action of debt would not lie upon a promissory note, was that of *Welsh* v. *Craig* (11 Geo. I.), 8 Mod. 373; 1 Str. 680, which is so inaccurately reported, that it is impossible to say, between what parties to the note the action was. In 8 Mod., "it was said, that it would not lie against the indorser, but that it would lie against the drawer." But we collect from the report, that the reason of the decision was, that before the statute of Anne, no action at all would lie upon the note, as a note (for which the case of *Clerke* v. *Martin*, 1 Salk. 129, was cited). That the statute gave only the same kind of action as upon inland bills, and that an action of debt was never known to be brought upon a bill of exchange. And probably, the court in that case relied on Hardr. 485, to support this position. Another reason given is, that the statute declares "that the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages, &c., which shows that an action of debt will not lie, because damages are never recovered in debt."

The first position, viz., that no action, before the statute, would lie upon a note, as a note, seems not to be correct, although supported by the case of *Clerke* v. *Martin*, for that case was directly contrary to the whole current of authorities prior to that time, particularly to the case of *Williams* v. *Williams* (5 Wm. & M.), Carth. 269; and the statute of Anne seems to have been made, not to alter the law, but to overrule this case of *Clerke* v. *Martin*, and to place promissory notes on the same footing on which they stood prior to that decision. (See the preceding note.)

It is true, that in *Milton's Case*, Hardr. 485, it was decided, that an action of debt would not lie against the acceptor of a bill of exchange; but the reason given shows that it would lie against the maker of a promissory note. For it was said, that the undertaking of the acceptor was only collateral, to pay the debt of another, and that the drawer continued debtor, notwithstanding the acceptance. So that the reason seems to be, that the acceptor was not the original debtor. But the maker of a promissory note is the original debtor, and therefore, an action of debt would lie against him, by the same rule that it would not lie against the acceptor of a bill.

*In *Baker* v. *Hill*, 3 Keb. 627, the action was debt on an inland bill, but it [*463 is not stated between what parties. There was a demurrer to the plea, and judgment for the plaintiff. This was eight years after the case in Hardres. And in the case of *Brown* v. *London*, 2 Keb. 695, 713, 758, 822; 1 Vent. 152; 1 Lev. 298; and 1 Mod. 285, it seems to be admitted, that an action of *indebitatus assumpsit* for money had and received would lie, if the acceptor had the money in his hands to pay.

In early times, "all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery was by this action of debt." 1 Reeve 159. It was not without repeated struggles, that the action on the case was permitted to be brought for breach of a personal contract. Even as late as the reign of Queen Elizabeth, it was considered as a matter of great doubt, whether *assumpsit* would lie, in any case, where an action of debt might be brought. The court of king's bench held, that it would; and the common pleas held, that it would not; but it was finally determined, after great debate, before all the judges of England, in the exchequer chamber, in *Slade's Case*, 4 Co. 93, that *assumpsit* would lie for the price of corn sold. The case of *Core* v. *Woddye* (28 Hen. VIII.), Dyer 20, is a strong case, to show that where the defendant has received money to which the plaintiff is entitled, he may have an action of debt for it.

A promissory note has always been held to be good evidence of money received by the maker of the note to the use of the payee. In that case, the court, in giving their opinion, said, "admit that there was not any bill testifying the receipt, yet by the common opinion of the books, it is in the election of the bailor to have an action of debt, or

account, in such a case." And in the case of *Meredith* v. *Chute*, 2 Ld. Raym. 760, it was said by the whole court, that a note was good evidence of a debt due from the maker to the payee. In Godbolt 49, the action is said to be "debt upon a *concessit solvere*, according to the law-merchant." This seems to have been some kind of an acknowledgment of a debt, in the nature of a promissory note. In *Domingo Franca's Case*, 11 Mod. 345, it was held, that debt or *indebitatus assumpsit* might be brought upon a bill of exchange by the payee against the drawer, "because it is in the nature of a security."

The action of debt was the ordinary remedy upon a tally, which seems to have been no better evidence of a debt than a promissory note. *A tally is thus defined by Spelman, in his Glossary, p. 532 (edit. 1637). "*Tallium, alias Talea, est clavola vel ligni portiuncula, utrinque complanata, cui summa debiti inciditur; fissaque inde in duas partes, una debitori, altera creditori traditur, in rationis memoriam.*" These tallies seem to have been a kind of common security for money, and to have been negotiable like bank-bills, passing from hand to hand by delivery only. 12 Mod. 241. Actions of debt upon them are mentioned in Fitz. Abr. tit. Debt, 4; 4 Edw. II.; Fitz. Abr.; Ley 68, 70; F. N. B. 122, I.; Dyer 23; Hardr. 333; and 2 Keb. 713. Sometimes, they were sealed, but in general, they were without a seal, and were only evidence of a simple contract. Against a common tally, the defendant might wage his law; and in Dyer 23, it appears, that "there is one book which says that a man may wage his law against a sealed tally, if the tally have only notches or scotches in dented, each scotche for twelve pence, according to the common usage; but if the sum be inscribed upon the sealed tally, he shall be ousted of his law."

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The case of *Rumball* v. *Ball*, 10 Mod. 38, was debt upon a promissory note; and although an objection was taken to the want of a demand, yet none was made to the form of the action. In *Rudder* v. *Price*, 1 H. Bl. 547, the action was debt upon a promissory note, payable by instalments; and although the case was warmly contested, and although Mr. Justice Lawrence, who was then at the bar, was for the defendant, yet no objection was suggested to the form of the action; but it was contended, and so held by the court, that an action of debt would not lie upon such a note, until all the instalments had become due.

Morgan, in his Precedents, p. 584, has given the form of a declaration in debt on a promissory note, and Kyd, in his Treatise on Bills and Notes, p. 114 (Dublin edit. 1791), after noticing some of the authorities on this subject, says, "the conclusion resulting from the whole seems to be this, that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained." Comyns (Dig. tit. Debt, A, 8) lays down the proposition generally, "that debt lies upon every express contract to pay a sum certain," and cites 1 Leon. 208. And Blackstone (3 Com. 154) says, "the legal acceptation of debt is, a sum of money due by certain and express agreement; as by a bond for a determinate sum, a bill or note," &c. "The non-payment of these is an injury, for which the proper remedy is by action of debt."

*But the question is now settled in England, in the case of *Bishop* v. *Young*, 2 Bos. & Pul. 78, where it was held, that "an action of debt lies by the payee against the maker of a promissory note, expressed to be for value received. The declaration in that case was, "for that the defendant, on ——, at ——, made his certain note in writing, commonly called a promissory note, with his own proper hand thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the plaintiff, by which note, the said defendant, one month after date, promised to pay to the plaintiff, or order, 8*l.*, value received in goods by the defendant, by reason whereof, and by force of the statute in that case made and provided, the defendant became liable to pay to the plaintiff the said sum of money in the said note mentioned, whereby an action hath accrued," &c. To this declaration, there was a general demurrer, in support of which the counsel relied chiefly on the case of *Welch* v. *Craig*, 8 Mod. 373; 1 Str. 680.

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Lord Chief Justice Eldon, in delivering the opinion of the court, examined the cases cited, and the principles on which the action of debt is founded. He held, that the

statute of Anne had put promissory notes on the same footing, and given upon them the same remedy, as was before had upon inland bills of exchange. That an action of debt would lie upon an inland bill of exchange, by the payee against the drawer, whom he considered as the original debtor, and therefore, debt would lie by the payee of a promissory note against the maker, who is the original debtor. He relied also on the words value received; and cited Hardr. 485; *Pearson* v. *Garrett*, Skin. 398; Com. Dig. Debt, B, Debt, A, 8 and 9; *Hard's Case*, 1 Salk. 23; *Hodges* v. *Steward*, Skin. 346; *Rumball* v. *Ball*, 10 Mod. 32.

The obection that the statute of limitations was not permitted to be given in evidence upon the plea of *nil debet*, is supported only by a *dictum* of Chief Justice HOLT, in 1 Salk. 278, *Anon.*, at *nisi prius* (Anno 1690), and in the case of *Draper* v. *Glassop*, 1 Ld. Raym. 153 (8 & 9 W. III.). The reason which he gives in the first case is, "For the statute has made it no debt, at the time of the plea pleaded; the words of which are in the present tense. But in case, on *non assumpsit*, the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise." The reason given in the case of *Draper* v. *Glassop* is, "because *non assumpsit* goes to the *præter* tense; but upon *nil debet* pleaded, the statute is good evidence, because the issue is joined *per verba de præsenti*, and *without doubt, *nil* [*466
debet by virtue of the statute; and it is no debt at this time, though it was a debt." In 1 Morgan's Vade Mecum 220, this case is cited with a "*sed quære*," and he advises that the statute should be pleaded.

The expression of the statute of Jac. I., c. 16, which is the same as that of the act of assembly of Maryland, 1715, c. 23, is, that the action shall be brought within such a time, and not after. It does not extinguish the debt, but only bars the remedy at law. The lapse of time is not, of itself, evidence that the defendant does not owe the money. The statute only creates a disqualification of the plaintiff to recover, like that of outlawry, alien enemy, *feme covert*, &c., or it may be considered as a special protection of the defendant, like a certificate of bankruptcy, infancy, or a discharge under an insolvent act.

That the debt is not extinguished by the statute, is clear, from the cases which have been decided since the time of Lord HOLT. In the case of *Quantock* v. *England*, 4 Burr. 2628, it was held, that a debt barred by the statute is a good debt to support a commission of bankruptcy. The same was expressly decided by Lord MANSFIELD, at *nisi prius*, in the case of *Fowler* v. *Brown*, cited in Esp. N. P. 563. And in *Trueman* v. *Fenton*, Cowp. 548, his lordship said, "all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. Where a man devises his estate for payment of his debts, a court of equity says (and a court of law, in a case properly before them, would say the same), all debts barred by the statute of limitations shall come in, and share the benefit of the devise." Hence it appears, that the reason which Lord HOLT gives for the distinction between *non assumpsit* and *nil debet*, is not supported. And if the reason fails, the law fails with it.

The objections respecting the letters of administration, and the omission of the *debet* and *detinet*, were supposed to come too late, after verdict.